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ECONOMIC SIGNIFICANCE OF THE ROBINSON-PATMAN ACT

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CHAPTER I

The Intent of the Act's Sponsors and the Intent of Congress

The Robinson-Patman Act was passed by Congress[1] just five years ago. If one could judge the importance of a law by the amount of discussion which it has caused on the part of businessmen, lawyers, and economists, the Robinson-Patman Act must mean considerably more to law, economics, and business practices than most laws. Yet even a year after the Act became effective, distinguished scholars could not agree as to the seemingly simple question of the general purpose of the law. Was it an act to preserve competition, as the majority report contended, or was it a law to restrict competition, as the minority report contended?[2] Was it a legitimate amendment to the Sherman Anti-trust Laws, or was it an anti-chain store law slipped into the wrong category by a clever political

[1]Act of June 19, 1936, c.592; 49 Stat. 1526; U.S. Code, Title 15, c.1, Sects. 13, 13a, 13b, 21a. Public 692, 74th Congress.

[2]Committee on Judiciary, H.R. Report 2287, to accompany H.R. 8442; 74th Congress. Part 1, Majority Report; part 2, minority report.

trick?[3]

At least some of the confusion surrounding the Act at the time it was passed was due to the fact that the business man had little understanding of the past interpretations of the highly

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[3]See, for example, E. P. Learner and Nathan Isaacs, "The Robinson-Patman Law: Some Assumptions and Expectations." (Winter, 1937) 15 Harvard Business Review 137, at 139.

> "Here we have obviously departed from the old philosophy and tried to save men from the ravages of competition. But once more the draftsmen of the act have been very adroit. They do not condemn in words the injury of certain competitors. They still talk as if the thing condemned is injury to competition. It is unlawful to engage in price discrimination the effect of which may be to injure, destroy or prevent competition with certain persons. What is the difference between hurting the corner grocer as an incident of competition with the chain store and hurting his competition with the chain? If the corner grocer must lop five cents off the marked price of a can of peas to meet competition, he is hurt, but is his competition hurt within the meaning of the Act? If the answer is yes, then the wording of the statute is grossly misleading. It is an anti-competitive statute slipped into the anti-trust laws. And since it stops competition at the level where it is most effective in American business, the only level where aggressive buying makes inroads on fixed prices, it amounts to a repeal of the anti-trust policy in a very important part of American business."

But see also in the same issue of the Harvard Business Review at 156, a different view by Melvin T. Copeland, "The Problem of Administering the Robinson-Patman Act."

Malcolm P. McNair "Marketing Functions and Costs and the Robinson-Patman Act" in Price Discrimination and Price Cutting, 4 Law and Contemporary Problems 334, June 1937 emphasizes the anti-chain ancestry. In the same issue James Angell McLaughlin "The Courts and the Robinson-Patman Act: Possibilities of Strict Construction," at p. 410 says the Act must be viewed in the light of the Anti-trust Laws. Breck McAllister, "Price Control by Law in the

technical anti-trust literature, and the lawyer who dealt only occasionally with marketing problems found it difficult to answer questions about the legality of advertising allowances and "push money."

Like many legal documents that carry much meaning, the brevity of the law has no bearing on its significance. Like the original Sherman Anti-trust Act[4], or the Constitution, the meaning must be found not only in the past record leading up to the passage of the Act, but also the record of what has happened since the Act went into effect.

Other reasons for the confusion in business circles at the time the Act went into effect are not difficult to discover. The Act began its life as an anti-chain store bill, and ended up as an anti-price discrimination law, applying as much to its friends and sponsors as to its foes. The Robinson-Patman Act was designed as a weapon to be used by the so-called "regular" or "orthodox" channels of distribution in their battle with the newer "mass distributors." The older system of wholesaler-to-independent-retailer was finding itself losing out in competition with the newer chains. Since the wholesalers and retailers were sure that they themselves could not be responsible for

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[3]United States: A Survey" in the same issue, at 273 says definitely at 289 that it is <u>not</u> an anti-trust law. Benjamin Werne, in his <u>Business and the Robinson Law: A Symposium</u>, Oxford University Press, New York, 1938, holds that it is an anti-trust law.

[4]The Sherman Anti-trust Act covers one page; the cases decided under it cover fifteen volumes.

their loss of position, they convinced themselves and convinced the legislators that the chains existed principally by virtue of buying advantages. These buying advantages were to be taken away by a law that would give the same price for "one twelfth dozen" as for a carload, in the language of the less intelligent sponsors.

Because the sponsors of class legislation can never work too directly to favor themselves or handicap their competitors, it was necessary for them to aim at a politically acceptable goal. As the Sherman Anti-trust Act has always been eminently respectable, whether enforced or not, the anti-chain store child adopted the direct descendent of the Sherman Act, the Clayton Act, as a proper parent. At the end of fifty years we have almost no agreement as to how the original Sherman Act has affected our economy; it is scarcely surprising, then, that an amendment to an amendment to the Sherman Act was not crystal clear. Because the leaders in the Wilson New Deal believed that the courts had not carried out the intentions of the Sherman Act, some of the work of enforcing fair competition had been delegated to the new Federal Trade Commission. It was unfortunate for the business man who must make decisions immediately on prices that he could not know the meaning of the new legislation until the Federal Trade Commission's attitude was known. The past record of the Commission showed no clear idea of a long range program, due probably to frequent

changes in personnel and to frequent reversals by the courts.[5] If the business man and his lawyers were not sufficiently impressed with the hazards of operating under the handicaps mentioned, the recent death of the NRA forcibly reminded them that the nation was not at all sure whether it did or did not want competition as a regulator of economic activity. The NRA and the anti-trust acts were at opposite ends of the pole as far as the underlying economic philosophies went, and to accept one was to reject the other.

That the Robinson-Patman Act seems to have taken on a fairly definite meaning in spite of the confusion in which it was surrounded is an indication that the sponsors of the Act directly or indirectly aimed at a real evil, and that business concerns have been willing to make drastic changes in their whole marketing procedure when convinced that a basically unfair situation had developed. That the Act has won the respect of large sectors of American business is also a tribute to a new spirit and a new standard of administrative performance

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[5] For a study of the part played by the personalities see E. Pendleton Herring, "The Federal Trade Commissioners" 8 George Washington Law Review 338. (Jan. Feb. Issue, 1940)

For a general treatment of the Federal Trade Commissions Procedure, see Gerard C. Henderson, The Federal Trade Commission, New Haven: Yale University Press, 1925; and Administrative Procedures in Government Agencies, Part 6, Sen. Doc. 186, 76 Congress, 3rd Session.

For a study of the general effectiveness of the Federal Trade Commission, see Thomas C. Blaisdell, Jr. The Federal Trade Commission: An Experiment in the Control of Business, New York: Columbia University Press, 1932.

by the Federal Trade Commission.

After five years of operation, we can fairly accurately classify the Robinson-Patman Act as an anti-price discrimination act. As such, it touches one special facet of the larger problem of public regulation of market practices. It is impossible to understand the special problem of control of price discrimination without a broad sweep of the larger problem, however brief that survey.

The corner stone in the law of trade regulation in the United States is the Sherman Act.[6] If the Sherman Act had accomplished its purpose of abolishing monopolies and restraints of trade, the legislation of the Wilson New Deal, the Federal Trade Commission Act[7] and the Clayton Act,[8] would have been

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[6] Two recent studies of the Sherman Act made for the Temporary National Economic Committee in its Investigation of Concentration of Economic Power are by Walton H. Hamilton, "Anti-trust in Action" Monograph 16 and Milton Handler, "A Study of the Construction and Enforcement of the Federal Anti-trust Laws." Monograph 38. A comparison of even the first two pages will show the essential difference in the opinions of two authorities associated with the present administration. Both agree that the anti-trust laws have not succeeded; Hamilton raises the question of a substitute and Handler believes we cannot say the Act has failed until it has been enforced.

[7] Act of September 26, 1914, c. 311; 38 Stat. 717; U.S. Code, Title 15, c. 2, Sects. 41-51.

[8] Act of October 15, 1914, c. 323; 38 Stat. 730; U.S. Code, Title 15, c.1, Sects. 12-27.

unnecessary. Had the latter Acts worked out as their sponsors hoped, the Robinson-Patman amendment would have been unnecessary. The Sherman Act is based on the simple faith that if competition is maintained, competition will itself do the trick of regulating our economy. To that problem we shall also direct our attention.

The Robinson-Patman Act is only one of a number of legislative enactments that have a common purpose, and stem from a common cause. The Miller-Tydings Act (Price Maintenance)[9] and the various so-called Fair Trade Acts are not within the scope of this article, except incidentally. The various chain store taxes will also enter only incidentally.

We are concerned, then, with a particular kind of regulation of the market--a measure to control certain kinds of price discrimination. To understand the causes of price discrimination, the causes of an anti-price discrimination law, and the probable effects of the present law, it is necessary to review our present marketing structure, with emphasis on the changes that have taken place in the last fifty years.

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[9]Miller-Tydings Resale Price Maintenance Act of August 17, 1937; 50 Stat. 693; U.S. Code, Title 15, c.1; Sect. 1; and c. 2, Sect. 45.

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CHAPTER II

The Problem and Its Setting

A. The Decline of the Wholesaler.

Fifty years ago there was in this country a fairly regular or orthodox system of distribution built up to suit the needs of the time. While, as Teele[10] points out, it is dangerous to over-simplify the marketing set up, it probably is true that there was a system of marketing which was reasonably uniform at least in contrast with that of today. The manufacturer had not yet arrived at the stage where he was particularly conscious of "selling" problems; his job was to produce goods, for which a rapidly expanding population seemed to provide an ever increasing demand. The country and the small town retailer had neither

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[10]Stanley F. Teele, "Logics and Emotion in Marketing" in Business and Modern Society, Cambridge: Harvard University Press, 1938, P. 301.

"One of the pronounced characteristics of present day marketing is the degree to which familiar designations such as wholesaler, retailer, broker, manufacturer's sales branches, fail to describe institutions which as a class perform similar functions. Widespread acceptance has been given, in this country, to an altogether fallacious belief that there once existed a simple and sound pattern from which we have deviated with unfortunate results. According to this notion, the 'natural' or 'normal' marketing pattern involved the movement of goods from manufacturer to wholesaler to retailer, with certain groups of functions definitely assigned to each of these links in the chain.

"...This simple pattern was never characteristic of all marketing. Many years ago the grocery, drug, and hardware trades were known as the jobbing trades thereby distinguishing them from other trades in which the use of wholesalers was less universal."

the time, the knowledge nor the inclination to hunt up the manufacturers from whom he could buy his goods, nor could the manufacturer be bothered with selling in small lots. The wholesaler, as the buying agent for the small retailer, performed a useful function for which he was rewarded accordingly.[11] The problem of the retailer was how to secure goods which his customers could buy. The wholesaler was the only agent who had a knowledge of "sources" of goods. The wholesaler frequently purchased the entire output of a mill, put on his own label, and sold to the retailer enough for a full years supply.

In this simple market structure, selling problems usually did not exist. Even the department stores, just beginning to enter the picture at this time, called the head of a department the <u>buyer</u>, not the <u>salesmanager</u>.

The first blow to the wholesaler came with the development of mass production techniques which made it possible to produce more goods than were immediately demanded by the buyers. At first, the manufacturer satisfied himself by seeking out the wholesalers, instead of waiting for the wholesaler to come to him, but even that was not enough to move the ever increasing volume of goods.produced by his mass production factories. The

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[11]See David R. Craig and Werner Gabler, "The Competitive Struggle for Market Control" in <u>Marketing in our American Economy</u>, 209 Annals American Academy Political and Social Science, 84. (May 1940)

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manufacturers began going direct to the retailer for part of their goods, and around the turn of the century, the manufacturers began taking their products direct to the consumer through advertising their own brands. Here entered two important factors in the decline of the wholesaler--the branding of goods by the manufacturer and the tendency of the manufacturer to go direct to the retailer or even to the consumer without passing through the wholesaler. As long as the retailer's customer asked for a bar of soap, the wholesaler serving this retailer could buy his soap from whom he pleased; but when the customer insisted on _Pear's Soap_, the wholesaler had to buy only from the manufacturer of _Pear's_. The wholesaler's importance and independence declined.

The automobile brought with it great changes, practically all for the worse as far as the wholesaler was concerned. These changes affected the retailer as well. Consumers began to shop over a wider geographical area, so that comparisons of price and quality were easier. The larger stores in the buying centers found themselves large enough to buy from the manufacturer direct, and the small town customer was getting so particular about the fashion she wore, because she travelled more than she did before the auto came into her life, that she refused to buy the "fashions" the wholesaler had sold to the retailer in last year's order. The wholesaler, then, was not doing too well for himself.

B. Changes in the Retail Market.

Both the wholesaler and the retailer were greatly affected by the changes in branding and the changes in the wider geographical shopping area, but these changes were small compared with the changes yet to come--the entry of"mass distributors." The first mass distributor was the department store; the mail order houses followed; then, came the chain. Because the First Census of Distribution was not taken until 1929, we have no reliable figures as to the dates on which each of these units became a serious threat to the "orthodox" or "regular channels" and because the influence of the low cost distributor extended far beyond the business he actually took from the village store. The "monopoly power" of the village store was partly taken away when the catalogues of Sears Roebuck or Montgomery Ward made it possible for the village store's customer to compare prices.

The question of whether brands have increased or decreased competition has not yet been completely answered, but as far as the small retailer was concerned, the answer was very positively yes. If his customer believed that John Smith's sausage was superior to that of the meat market down the block, where sausage was five cents less, John Smith could say that he sold a higher quality sausage. If both sausages carried the same brand, the area of price competition widened. More emphasis was placed on price comparisons by the customer, causing more price competition among retailers. Because of the current emphasis on the decline of competition, we are apt to overlook those fields in which competition increased. One of the best

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students of this field, E. T. Grether, believes the increase in price competition between the different retailers is the main cause of the resort to the law for help.[12]

The chain store probably had its greatest period of growth from the end of the World War to 1929. Nothing much was done in

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[12] See Ewald T. Grether, Price Control Under Fair Trade Legislation, Oxford University Press, 1939. Grether discusses the Robinson-Patman Act only incidentally, but his treatment is one of the best available. See especially Chap. IX, "The Play of Interests In Retailing" P. 225-55. He refers to the causes of price maintenance legislation in particular in the following quotation from p. 231, but much the same causes are responsible for both types of price control laws.

> "The growth in importance of powerful brands of goods sharpened much of retail competition by focussing it upon identical goods between stores, by increasing the returns from leader strategy in merchandising, and by reinforcing the other influences making for wider retail selling radii and larger volume of sales per store. But there is still opportunity for considerable product differentiation between retail shops because there is as yet no marked brand dominance in most lines. Further, the full impact of the growth of well-known brands upon retail competition may be offset by price uniformity between stores. The standardization of prices on identical goods makes for a wider diffusion of the retail business with narrower selling radii and small sales per store. The desire to produce this effect provides the incentive for the small dealers who are pushing for resale price maintenance on trade marked goods."

the way of resort to the legislature by its opponents until 1927, when Maryland enacted the first state chain store tax, which along with similar tax measures enacted by Georgia, South Carolina and North Carolina, was declared unconstitutional.[13] Not until 1931 was the first chain store tax upheld by the United States Supreme Court in State Board v Jackson.[14] It is no doubt true, as summarized by the Twentieth Century Committee on Distribution in its excellent study Does Distribution Cost Too Much?[15] that

> "At times it might almost be said that particular groups become effective in politics to the degree that they lose effectiveness in business."

C. The Decline in Economic Strength and the Rise of the Political Power of the Independent.

To understand both the loss of economic effectiveness, and the gain of political power, a review of a few figures will be helpful. It is important to understand at the outset that in spite of the revolution in distribution, the so-called orthodox channel of manufacturer-to-wholesaler-to-retailer is still the dominant form, not only in overwhelming superiority of numbers, but also in total volume of business transacted. The best

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[13] See authorities collected by George J. Feldman, "Legislative Barriers to Chain Stores and its Minimization" in Governmental Market Barriers 8 Law and Contemporary Problems 334, Spring 1941.

[14] 283 U.S. 527 (1931).

[15] New York, 1939. See page 247.

"guesses"--and only guesses seem available until the final figures of the 1939 Census are available--tell us that approximately fifty per cent of all retail sales follow this channel. No other single channel approaches that percentage.[16] For purposes of general analysis, it is safer at this moment to use the more complete figures of the Census of 1935 and the Census of 1939, but a quick review of the incomplete figures for the Census of 1939 seems profitable.

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[16] See, for instance, Alexander and others, Marketing, Boston: Ginn and Company, 1940, Chap. 14, P. 378.

Paul D. Converse and Harvey W. Huegy, Elements of Marketing, New York: Prentice-Hall, 1940.

Does Distribution Cost Too Much, P. 78, op. cit.

Selected Figures[17]

1939 Census of Distribution

Type of Operation	No. of Stores	Sales, 1939	Per Cent
Total	1,770,355	42,041,790,000	100
Independents	1,624,665	31,409,859,000	74.7
Chains	123,195	9,105,825,000	21.7
Other types	22,495	1,526,106,000	3.6

Changes in Percentage, 1939, 1935, 1929

by Types of Operation

Type of Operation	Per Cent Total Sales		
	1939	1935	1929
Total	100	100	100
Independents	74.7	73.3	77.6
Chains	21.7	23.3	20.3
Other types	3.6	3.4	2.1

Note: All figures on chains and independent stores should be read with the definitions of the Census Bureau in mind:

"Independents. The chief characteristic of this classification is that these stores are local, individual enterprises, usually, but not always, "owner operated." For purposes of classification in this census, three or fewer stores under one management-ownership have been classified as independents.

Chains. The chief characteristic of this classification is that these stores are groups of four or more in the same general kind of business owned and operated jointly with central buying, usually supplied from one or more central warehouses. The number of stores includes each

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[17] Industrial Reference Service, April 1941. Business Series 3 Sixteenth Census of United States, Release of April 16, 1941 U.S. Department of Commerce.

> retail establishment and is not a count of the number of chain store groups. Neither does it include the warehouse nor central buying offices maintained apart from the stores. Usually the operation of each store is in the hands of a manager who is not identified as an owner. Central advertising and personnel policies are frequently other characteristics of chain operations.
>
> Other Types. These other types may involve some of the characteristics of independents or chains but are segregated because they represent important methods of retail distribution. Among the principal types are utility-operated stores, direct selling (house to house), State liquor stores, and mail-order houses."

A very brief analysis of these figures will show that the independent retailers increased from 1,435,054 units in 1935 to 1,624,665 units in 1939--an increase of 189,611 units over a five-year period. The chains, on the other hand, decreased from 131,430 in 1935 to 123,195 in 1939, or a decrease in five years of 8,235 units. What is more important is the fact that the chains decreased their percentage of total retail sales from 23.3 per cent in 1935 to 21.7 per cent in 1939. Whether this decrease means that the trend of business towards the chain has been reversed, the evidence will not permit us to say without further study and until more years have passed. It should be noticed that the chains are doing a larger percentage of the total retail sales than they were doing in 1929. The decline in the number of outlets can be explained almost entirely by the tendency towards fewer and larger stores, a policy forced on the chains by the newest competitor, the super-market and by chain store taxes based on the number of

units in the chain.[18]

In connection with the figures given by the Census of Distribution, several caveats are important. In the first place, the per cent of total retail sales done by chains does not necessarily correspond with the amount done by what the "independents" in the political sense regard as their enemies--the "mass distributors." Some extremely large organizations, notably the independently owned super-markets are rightly classed as independents; an independently owned super-market may actually offer stiffer competition to the corner grocer

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[18] The preliminary figures give some interesting material on the distribution of chain stores by states. It might be interesting to note that the greatest legislative opposition to chains seems to be coming from those states in which the growth of the chain is comparatively recent. Massachusetts and Mississippi show respectively 26.3 per cent and 10.9 per cent of total retail business done by chains. The thickly populated states like Massachusetts have been comparatively free from strong opposition to chain stores. See Ind. Ref. Ser., op. cit., P.2. Compare with State Distribution of Chain Stores in the studies by the Federal Trade Commission. Senate Document 130, 73 Congress 2d session. It would seem fair to say that the leadership in the anti-chain movement has come largely from those states in which the chains are weakest.

1928 Distribution of Chain Stores Per 100,000 Population

Alabama,	Mississippi,	Arkansas,	Oklahoma,	Texas,	Massachusetts,
22.2	7.6	15.1	21.9	20.9	106.2

New York,	New Jersey,	Rhode Island,	Michigan
83.4	110.4	78	76.4

Note: Selected at random from Federal Trade Study above.

than the corporate chain next door. A separate report on the supermarket is in preparation by the Census Bureau at the present time. Perhaps a more important failing is in the lack of figures on non-corporate chains, the voluntaries and the cooperatives.[19] The voluntary chains are the groups of stores who achieve some of the advantages of the corporate chains by doing most or all of their buying through one wholesale house; sales helps of various kinds are usually part of the program of both voluntary and cooperative chains. The form of organization may be almost as rigid as that of a corporate chain, or as loose as the traditional independent store. The voluntary chains are dominated by the independent wholesaler who organized the group as a means of saving both himself and the retail dealers on whom he depended for existence. The cooperative chain, on the other hand, was organized by a group of retailers, who may or may not organize their own wholesale house. The estimates of the amount of business done by this important type of chain are especially untrustworthy because the organizations are changing all the time. It is probably safe to say that all of the non-corporate chains put together do not sell as much goods as the largest corporate chain--the A&P. The 1939 Census

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[19] For sources on the voluntary and cooperative chains, see especially Does Distribution Cost Too Much, op. cit. 85 to 87.

Converse, Elements of Marketing, op. cit., 401 ff.

Alexander, Marketing, 362 to 373 gives one of the best short accounts and gives an excellent bibliography.

than the corporate chain next door. A separate report on the supermarket is in preparation by the Census Bureau at the present time. Perhaps a more important failing is in the lack of figures on non-corporate chains, the voluntaries and the cooperatives.[19] The voluntary chains are the groups of stores who achieve some of the advantages of the corporate chains by doing most or all of their buying through one wholesale house; sales helps of various kinds are usually part of the program of both voluntary and cooperative chains. The form of organization may be almost as rigid as that of a corporate chain, or as loose as the traditional independent store. The voluntary chains are dominated by the independent wholesaler who organized the group as a means of saving both himself and the retail dealers on whom he depended for existence. The cooperative chain, on the other hand, was organized by a group of retailers, who may or may not organize their own wholesale house. The estimates of the amount of business done by this important type of chain are especially untrustworthy because the organizations are changing all the time. It is probably safe to say that all of the non-corporate chains put together do not sell as much goods as the largest corporate chain--the A&P. The 1939 Census

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figures on this type of organization will give the only reliable estimates on this subject. The "voluntaries" were originally formed to fight the chains but at the present time it is impossible to say whether the voluntaries are more like the traditional independents or more like the corporate chains. Some interesting developments in this field will bear watching.

The essential problem of the chain versus independent battle is summarized in two figures taken from the new census: the average sales volume of the independent retailer in 1939 was $19,333. The average sales of one unit in the chain was almost four times as high, or $73,914.

For further analysis of the littleness and bigness problem in distribution, we must go to figures older than the 1939 census, for the reason that not enough of the 1939 figures are available as yet. However, enough figures for 1939 are available to show that the analysis would not be changed in any significant degree.

For the problem of littleness in retailing, one of the best studies is that of Paul T. Cherington.[20]

> "In this country most of the discussion of operating scale in recent years has been concerned with the dangers of operating business on too big a scale... But in retail distribution the real menace is the danger of allowing business to be too small to pay

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[20]See his article "Economic Aspects of Some Recent Trade Legislation" in <u>Werne</u>, op. cit., at 26-39.

> the going rate for managerial brains out of the normal mark-up."[21]

> "The small merchant is obviously a convenience to the public in many instances, but he costs money. How much he represents in the notoriously excessive cost of merchandise distribution never has been pointed out adequately. Until recently, we have had no figures to show what he did in relation to what he cost. But from the three sets of figures collected by the Census of 1930, 1933, 1935, some ideas about these two phases of the small merchant can be deduced."[22]

There were, counting independents, chains, mail-order houses, 1,654,948 stores in 1935. Of this number, 76.7 per cent, or over one million two hundred thousand stores, did less than twenty thousand dollars in total volume per year. Cherington believes that over a period of time, it is difficult to make a profit of over two per cent. Two per cent of $20,000 gives the retailer only $400 per year, or less than eight dollars per week. Since it is impossible for these one million two hundred thousand retailers to make a living on a normal profit of four hundred dollars per year, Cherington thinks either of two things must happen; either we allow a million families to live at less than a decent standard, or we pay far more than the two per cent that seems to be the required

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[21]Ibid, at 31 p. 34

[22]Ibid, p.31.

normal profit to keep distributors on the job serving the public. In either case, the results are economically bad.[23]

Cherington thinks it was quite natural for the small retailer to attempt to raise his pay by an appeal to the legislators, just as the laboring man, the farmer and almost everyone else seemed to be doing, but before discussing the small retailer's resort to the legislature, it is necessary to contrast the problem of bigness in retailing...and that is another story.

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[23] It is almost impossible to overemphasize the problem of littleness in retailing. While there may be some question as to whether Cherington is allowing too low a per cent of profit (See, for instance, the profit figures of all distributive companies whose stocks are listed on the public stock exchanges in Survey of American Listed Corporations, Compiled from records of the Securities and Exchange Commission, Volume II, June 1939.) His analysis is supported by other authorities. See Alexander and others, op. cit. P.399. Alexander develops an interesting point on the non-economic reasons for survival of inefficient units of distribution. Converse, Elements of Marketing discusses the same problem on P.302. The Twentieth Century Committee on Distribution has found the same situation. See Does Distribution Cost Too Much, op, cit. Chapts. 4,5, and 10. The committee's estimate on profits is exactly the same as Cherington's. See P.335.

D. "Bigness" in Distribution.

Even though the number of units too small for economic efficiency creates a real problem, it is by no means to be argued from that fact that there is no problem of bigness. While 76.7 per cent had less than $20,000 in sales per year, and accounted for only 23 per cent of total retail sales, 20.8 per cent of all sales were made by a handful of only 8,444[24] stores doing business of $300,000 per year and over--a mere half of one per cent of the stores sold 20 per cent of the total.

In the period before the start of the strong agitation against the chain stores, the chain stores gained at a startling rate. Congress in its first resolution[25] asking the Federal Trade Commission to report on the dangers of monopoly present in the sudden growth of the chains, reported that the per cent of total retail business had increased from 4 per cent in 1920 to 16 per cent in 1927. Whether these figures were correct or not we have no absolute method of checking, because the census figures previous to 1929 did not show much of anything on distribution trends, but we do know that the 4 per cent figure is

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24 Cherington, op. cit., P.31.

25 Senate Resolution 224, 70th Congress. Quoted in <u>Final Report of The Chain Store Investigation</u>, Federal Trade Commission, 1935, 74th Congress, Senate Document number 4.

accepted by the spokesman for the chain stores,[26] and the census of 1929 showed 20.3 per cent of all retail business going through the chains. It is estimated that from five to seven billion dollars worth of foods are sold each year.[27] While the largest chain, the Great Atlantic and Pacific Tea Company, did only $194,647,000 in 1919, by 1929 its sales had risen to over one billion dollars, or almost one sixth of all food sales for the entire United States. The five largest chains, the A&P, Kroger, American Stores, Safeway, and First National did less than a half billion in 1922, but did almost two billion of the $7.3 billion food sales in 1929. The five largest chains did over a third of the business in food--the largest and most essential field of retailing.

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[26] John P. Nichols, The Chain Store Tells Its Story, New York Institute of Distribution, 1940 Edition. See especially Chap. 4, "The Chain Store Legislative Problem," 127. This annual publication, while written frankly from a partisan point of view, not only expresses the view of the chain store group, but also includes much material not easily located elsewhere.

[27] For an excellent factual study of the effect of the chains on food distribution, see A.C. Hoffman, Chief Agricultural Economist, Department of Agriculture, Large Scale Organization in the Food Industries. This is a Monograph prepared for the Temporary National Economic Committee in its Investigation of Concentration of Economic Power, Washington, 1940. See Chap. 2, "Mass Retailing of Food Products," P.8. Hoffman is very favorably inclined toward the chain stores. Some of his historical material is subject to challenge, but the material is generally good. Quoted hereafter as TNEC Monograph 35.

In point of number of outlets, as contrasted with total sales, the figures again are indicative of giant organizations. As early as 1924 the A&P had 11,421 stores, and reached a high of 15,737 in 1930. Safeway had 3,364 stores in 1936, while Kroger had 4,212.[28] It is interesting to note that since 1930 A&P has been reducing the number of its stores to take advantage of the "supermarket" organization begun during the depression by independents, and developed by them into a real rival to the chains.[29] Where the average retail establishment in 1939 sold a volume of $19,333, the average unit in the A&P chain sold over $93,000 in 1939. The average for the A&P in 1932 was $56,569 per store, but where the A&P had 15,427 stores in 1932, it had reduced that number to 10,250 in 1939. Safeway had the terrific volume of $129,230 per store in 1939.

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[28] A. C. Hoffman, Monograph 35, op. cit., P.6. The official title of the A&P is The Great Atlantic and Pacific Tea Co.--its popular name will be used because it is more descriptive.

[29] For a late summary on the supermarket development, see M.M. Zimmerman "The Supermarket and the Changing Retail Structure", 5 Journal of Marketing 402, April 1941. Starting as a depression phenomena in 1932, when King Cullen introduced the supermarket in the East, the supermarket has developed so fast that Zimmerman estimates a business of two billion dollars was done in 1940. There were 5,301 independent operators and 2,769 chain units, including 1,540 operated by A&P. The census bureau has not yet released its figures on the supermarket, but more exact figures are promised by the census bureau before 1941 is over.

[30] All figures from Poors Industry and Investment Survey, Grocery Chains, B February 4, 1941.

That this tendency towards concentration of the distributive trades was not confined to the food line is shown, to take only a random illustration, in the $166,514,110 sales of the giant mail-order house of Sears Roebuck, which had grown to $268,731,794 in 1927.[31]

Year	Sales
1934	$318,000,000
1938	$501,677,000[32]
1940	$704,301,014(New York Times clipping)[33]

The New York Times for Sunday, April 13, 1941, carried a list of some of the important Department stores, Specialty shops, Mail Order, and Chain stores. This list is by no means complete, as it leaves out the largest chain, the A&P which had sales of $1,115,774,000 according to the New York Times, July 7, 1941,--the highest in the history of any chain. This list with the addition of only the A&P would show a total of almost six billion dollars, or about one seventh of all retail sales in the United States in the hands of sixty-seven companies.

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[31] Quoted in Edmund P. Learned, Problems in Marketing. New York: McGraw Hill, 1936, P.579.

[32] Survey of American Listed Corporations, op. cit, at Table ix.

[33] The most recent treatment of the problem of concentration in the distributive trades is that of Reinhold P. Wolf, "Monopolistic Competition in Distribution" in Governmental Barriers to Distribution, 8 Law and Contemporary Problems 303, Spring, 1941.

MAIL ORDER, CHAIN STORES

	Sales		Net Profits	
	1940	1939	1940	1939
American Stores Co.	$124,838,734	$114,824,010	$989,602	$1,153,659
H. C. Bohack Co, Inc.	25,594,831	23,841,802	*69,456	44,960
Bond Stores, Inc.	32,444,508	24,588,574	2,690,553	2,643,552
Chicago Mail Order	26,698,413	25,853,626	313,304	308,849
Consolidated Retail	9,945,043	9,337,764	275,739	288,810
Edison Bros. Stores	26,481,080	24,911,899	1,041,223	897,055
Fanny Farmer Candy	8,481,544	7,497,481	976,981	960,485
W. T. Grant Co.	111,774,965	103,761,685	3,542,210	3,824,996
H.L. Green Co., Inc.	47,214,607	43,996,478	2,070,011	2,106,415
G. R. Kinney Co., Inc.	15,626,573	15,476,229	306,428	337,278
S.S. Kresge	158,678,509	153,911,145	10,070,389	10,450,624
S. H. Kress & Co.	88,299,961	84,851,373	5,339,161	4,963,870
Kroger Grocery	258,115,025	243,356,605	4,607,126	5,514,597
Lerner Stores Corp.	42,499,001	40,500,217	1,415,806	1,535,318
McCrory Stores Corp.	46,207,883	43,193,608	2,332,511	2,231,012
McLellan Stores Co.	24,030,779	23,086,047	982,641	973,306
Melville Shoe Corp.	40,260,777	38,326,853	3,210,961	3,141,161
Montgomery Ward	515,910,915	501,819,199	23,028,017	27,010,645
G.C. Murphy & Co.	53,365,581	47,284,970	3,363,535	3,307,822
Neisner Brothers	22,492,308	22,638,645	443,693	563,468
J.J. Newberry Co.	55,879,580	52,272,953	1,976,893	2,325,408
National Tea Co.	61,919,443	56,824,450	346,391	*369,080
J. C. Penney Co.	304,539,325	282,133,933	16,230,607	16,481,213
Peoples Drug Stores	23,979,909	22,775,927	1,069,108	1,020,071
Reliable Stores	10,763,534	9,316,739	686,791	518,586
Safeway Stores	396,566,000	385,428,000	4,836,652	6,268,360
Sears, Roebuck	703,301,014	617,442,266	36,086,668	37,255,274
Spear & Co.	9,917,000	8,609,000	349,071	108,434
Sun Ray Drug Co.	7,876,000	7,441,000	232,389	214,211
Union Premier Food	29,200,548	24,498,783	658,656	812,832
United Cigar-Whelan	50,036,735	50,144,843	120,946	*235,378
Western Auto Supply	53,902,633	45,302,174	2,746,578	3,169,904
F.W. Woolworth C.	335,474,819	318,839,663	24,104,815	29,310,353
	$3,723,317,577	$3,474,059,941	$156,376,000	$169,138,070

*Loss

DEPARTMENT STORES

	Sales		Net Profits	
	1940	1939	1940	1939
Abraham & Straus	$24,167,486	$23,426,485	$1,072,643	$1,008,141
Arnold Constable & Co.	10,542,331	9,168,486	452,168	430,696
Associated Dry Goods	63,383,675	61,253,093	2,312,465	2,016,568
Bloomingdale Bros.	26,047,123	25,465,313	687,433	692,229
Bullock's Inc.	27,127,531	25,415,035	1,449,398	1,317,829
Emporium Capwell	26,055,307	25,094,973	1,609,939	1,350,116
Marshall Field & Co.	89,970,818	84,029,380	#6,789,126	#5,320,933
Wm. Filene Sons Co.	37,429,597	37,429,597	585,897	877,240
The Fair	16,523,252	15,479,435	2,348,054	*154,752
Gimbel Brothers	99,546,531	92,231,119	607,691	1,402,295
Boldblatt Brothers	48,519,037	47,975,422	388,154	797,381
Hale Brothers Stores	15,016,241	15,084,510	251,124	408,373
Hearn Dept. Stores	19,729,842	20,019,628	1,418,779	23,824
Kaufmann Dept. Strs.	27,271,859	25,103,801	1,473,546	1,243,517
F. & R. Lazarus	27,013,038	24,177,887	*#3,957,532	1,451,228
R.H. Macy & Co., Inc.	*#135,323,577	*#130,433,686	269,128	*#3,906,939
Mandel Brothers	18,506,099	18,089,250	5,046,798	256,208
May Dept. Stores	112,954,905	103,905,198	1,011,217	4,402,894
Meier & Frank	17,075,813	16,217,410	904,695	1,049,083
National Dept. Stores	42,743,004	40,811,592	43,886	546,379
O'Connor, Moffatt & Co.	4,137,221	4,033,815	601,790	7,890
Outlet Company	7,605,227	7,485,903	628,583	506,944
Richi's, Inc.	11,570,599	10,223,333	361,190	577,021
Rike-Kumler	7,685,859	6,725,970	275,383	305,866
B. F. Schlesinger Co.	9,473,840	9,029,479	259,883	211,970
Wieboldt Stores	25,088,895	24,425,972	699,621	524,432
	$950,508,706	$903,735,772	$35,406,123	$30,481,244

*Loss
#Retail operations only.
*#Includes affiliated stores.

SPECIALTY SHOPS

	Sales		Net Profits	
	1940	1939	1940	1939
Best & Co.	$16,384,120	$15,607,340	$1,111,398	$1,047,004
A. De Pinna Co.	3,021,733	2,737,634	104,910	83,492
I. Magnin & Co.	12,025,928	11,706,975	436,278	259,864
Russek's Fifth Ave.	5,172,569	5,142,863	112,468	53,519
Franklin Simon & Co.	8,578,849	7,961,532	*63,754	*176,952
Raphael Weill & Co.	6,557,451	6,377,005	213,953	184,241
	$51,740,650	$49,533,349	$1,915,253	$1,451,178

*Loss.

To put the problem of bigness in another way, take the statement from Hoffman.[34] To contrast the picture of bigness and littleness in the retail trades one could, for instance, say that the 41.2 per cent of the total number of retail establishments who do less than a volume of $5,000 a year accounted for only $1,479,225,000--or less than the sales of two large chains--Sears Roebuck and A&P. But further demonstration is superfluous.

E. The Resort to the Legislature.

During the 1920's when the chains were gaining rapidly, it was inevitable that some of the older forms of distribution should suffer loss of business. Not only did the older units lose the amount of business done by the chains, which was substantial, but they also were forced to come nearer to meeting

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[34]Hoffman, op. cit., TNEC, Monograph 35, p.11.

"The contrast between the mass distributor and the traditional independent grocer so far as size of the store unit is concerned is illustrated by the following comparison: To do 1 per cent of the total grocery business of the United States it takes on the average 429 stores of the supermarket type, 1,170 corporate chain stores, 4,000 voluntary chain units, and more than 10,000 unafiliated independent stores. In other words, the average supermarket has a volume business of nearly twenty-five times that of the average independent, while the average corporate chain unit is nine times as large."

the lower prices of the chains to keep what business they could. When the depression reduced the total volume of retail sales from forty nine billion in 1929 to thirty three billion in 1933, the shoe really pinched. Judging purely by results, the orthodox distributors seemed to be losing the battle on the economic front; but they had the benefit of numbers on the political front, and they were under pressure to do something about it at a time when it was common for all groups to appeal to the government for a law to make things right.

If the small retailers and wholesalers made use of political pressure to bring the forces of government to their side of the fight, we need not be surprised, for history gives us plenty of precedents for similar action by others. And if the final result was not exactly what the group planned and hoped for, we still have plenty of evidence that the same thing has often happened before. As McNair points out:

> "...government having to an increasing extent abandoned its impartial role of umpire in favor of partisan interference, small retailers, aware of the tariff favors bestowed on manufacturers in previous years and more recently observing the benefits distributed to farmers, have now organized themselves to exert pressure with a view to making their own economic position more comfortable. Of course it goes without saying that these seekers of advantage march boldly forward with good conscience under the banners of public welfare."[35]

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[35]McNair, "Marketing Functions and the Robinson-Patman Act" op. cit., 335

or to quote again from Does Distribution Cost Too Much:

> "Most laws discussed in this chapter came out of the changing fortunes of competitive groups. At times it might almost be said that particular groups become effective in politics to the degree that they lose effectiveness in business."[36]

Before reading the story of the Robinson-Patman Act's travels through the halls of Congress, it would be well to consider the suggestion of Grether:[37]

> "Throughout the United States in the past few years legislators have been busy placing restrictions upon competition in the marketing of commodities. Among the new regulations of trade practices none are so potentially significant as those relating to price competition. Almost invariably these new laws, when they were emitted from the legislative hoppers, bore descriptive titles such as 'Fair TradeAct,' 'Unfair Practices Act,' 'Fair Sales Act,' 'Unfair Sales Act,' 'Unfair Competition and Discrimination act.' As a consequence of this use of descriptive adjectives to identify statutes confusion has arisen concerning the purposes and content of the various enactments... Under these circumstances, in order to avoid confusing the citizen further, it would appear sound law in the future either to forbid descriptive titles or to establish a central federal bureau of registration for statutory titles similar to that for the registration of trade marks."

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[36] op. cit., p.247.

[37] Ewald T. Grether, Price Control Under Fair Trade Legislation. New York: Oxford University Press, 1939, P.3

The life of the Robinson-Patman Act before it became the law of the land on June 19, 1936,[38] is worth repeating not only because it is necessary to know the Act's history to make any sense out of its words, but also because it typifies much pressure legislation by economic groups. Congress had begun an investigation of the American Retail Federation to determine, among other things, whether C. O. Sherrill, its president, was paid $50,000 a year "to gather statistics."[39] The Committee found that it was organized supposedly as a spokesman for the independent merchants, but was financed by the chain and department stores. One of the moving spirits in the investigation was Congressman Patman of Texas. When the leaders of the United Wholesalers Grocers Association wanted to introduce a bill written by their legislative counsel, Judge H.B. Teegarden, Congressman Patman was the most likely sponsor.[40] The Wholesalers were desirous

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[38]See Footnote 1.

[39]Congressional Record, 74 Congress, 1st Session, P.8104-8106.

[40]Benjamin Werne, Business and the Robinson-Patman Law, Oxford University Press, 1938, Wheeler Sammons, Legislative History, Pp.99-131.

Benton A. Zorn and George J. Feldman, Business Under the New Price Laws, New York: Prentice-Hall, Inc., 1937, Chap. IV, P.46.

See also Investigations of Concentration of Economic Power, Monograph 26, Economic Power and Political Pressure. P.181.

of putting into law a provision of the N.R.A. (just killed by the nine Old Men) which would have helped to restore the wholesaler to his former importance by a device that almost tended to make it necessary for every retailer to buy through a wholesaler, instead of direct from the manufacturer. Obviously this "functional discount" clause would penalize the retailer, but the support of the small retailers was secured by emphasizing the "effect on the chains." When the bill was reported to the house by Judge Utterbeck[41] he explained the purpose:

> "The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening anti-trust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other business men."[42]

In his majority report, Judge Utterbeck quoted, among other materials, the findings of the Federal Trade Commission's investigation of the chain store,[43] the Goodyear Case.[44]

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[41]Report of Mr. Utterbeck, Com. on Judiciary to accompany H.R. 8442-H.R. Report 2287, Serial 9993, amends sec. 2 of Act of Act 15, 194

[42]Ibid, P.3

[43]Final Report of the Chain Store Investigation, Federal Trade Commission. 74th Cong. Sen. Doc. #4, 19, filed Dec. 14, 1934. Published 1935, made in response to Senate resolution 224,70 Congress. Hereinafter cited as Final Chain Store Report.

[44]Matter of Goodyear Tire and Rubber, Federal Trade Commission, Docket 2116, March 5, 1936, 22 F.T.C. 232, hereinafter cited as Goodyear Case.

He also quoted the "Economist's Committee on Anti-trust Policy." The words of Judge Utterbeck have been quoted and quoted again to show what the Act means.

Apparently Mr. Utterbeck's interpretation was not the only possible interpretation, for another member of the same Committee, Mr. Celler, in his Minority Report[45] believed the purpose should be "to destroy equality of opportunity in business, weaken the anti-trust law, create a monopoly." Celler particularly objected to including the list of economists who favored enforcement of the anti-trust laws--(the majority report did not say that these economists favored the Patman Bill, but if the new Bill was part of the anti-trust laws, would they not endorse it, too?)--and showed telegrams from scores of these economists who professed no opinion or a negative opinion on the new Bill. Mr. Celler, incidentally, quotes Henry Ford:

> "There is no way to limit competition. It is something that either is or is not. Barring competition is only a way of bringing in price fixing, and price fixing is not only the refuge of the inefficient man, but also a stone wall across the path of progress. Of course, if that goes under the name of competition it is not competition, but racketeering. The competition of quality and service is the only competition worthy of the name... When government enters largely into industry or distribution, or into any of the elements that go to make up our lives, competition is replaced by regulation... Since regulation must bar competition, and directly or indirectly fix prices, everything that is obsolete will be preserved and nothing that means progress will be allowed."[46]

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[45] H.R.Report 2287, Part 2, to accompany H.R. 8442. April 8, 1936.

[46] Ibid. P.9.

But like his colleague's majority report, Celler fails to say whether or not the authority he quoted had the Patman Bill in mind. But the Patman Bill as reported by Judge Utterbeck was considerably modified when the House and Senate got through with it. Incidentally, the "functional discount" of its original sponsors was lost in the process.[47]

The Act as passed by Congress, then, was not the bill sponsored by the Wholesale Grocers Association to help them retain or regain their "place in the sun."[48] But the Act as written could still be interpreted as a weapon for the old style distributors, if interpreted in a one-sided manner. This takes us to a study of the Act as enforced by the Federal Trade Commission.

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[47]See Conf. Report, June 8, 1936. H.R. Report 2951.

[48]That the policy of rushing to the legislature for aid when an established industry is challenged by a newer industry is an old, old, story is illustrated by the following quotation from Abbot Payson Usher's <u>An Introduction to the Industrial History of England</u>. Boston: Houghton-Mifflin, 1920, at P.280

"Parliament in England was accessible to almost any suggestion that an established industry was endangered. The English protective system, therefore, was specifically designed to protect vested interests: it was directed against the great transformation of habits of consumption brought about by the trade with India."

<u>Calico Act of 1721</u>: "An act to preserve and encourage the woolen and silk manufacturers and for the more satisfactory employment of the poor, by prohibiting the use and wear of all printed, painted, flowered or dyed calicoes in apparel, household stuffs, furniture or otherwise. The act made it unlawful for any person to use or wear any calicoes under penalty of forfeiting five pounds to the informer and paying a fine of 20 pounds. Merchants were not allowed to sell any calicoes, or any furniture upholstered with calicoes." See Usher at 284,285.

[48]For the attitude that one is to be protected in his trade from competition, see the application of the Statute of Apprentices, Lipson, Economic History of England, London: Black, 1931. Part 3, P.279 ff.

CHAPTER III

The Act As Interpreted by the Federal Trade Commission in the First Five Years

That an Act with so varied a history would need interpretation, is self-evident. As Copeland said in 1937:[49]

> "What this legislation will accomplish hinges largely on how the Act is administered by the Federal Trade Commission. It can remain practically a dead letter, like many another law on our state and federal statute books; it can be administered in a narrow, vacillating manner, so as to become a nuisance to business and of little benefit to the public; or it can be handled in a broad, constructive manner beneficial alike to business and to the public."

In answer to the question raised by Copeland, as to whether the Act would be administered in a "narrow, vacillating manner," as to whether it would be enforced only against the mass distributors, Edwin B. George expressed the belief of many when he said:

> "For our mental satisfaction, we can continue to be irritated with a law that in spirit just fell short of being fanatical; in fidelity to the tradition of American business, we may find a way to extract the good that is in the Act."[50]

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[49] Melvin T. Copeland, "The Problem of Administering the Robinson-Patman Act," 15 Harvard Business Review 156, (Winter, 1937)

[50] George's article, "The Robinson-Patman Act Begins to Acquire Meaning," 48 Dun's Review 20, March 1940, is one of the most comprehensive surveys of the effects of the Act. For another good review, see also Paul D. Converse, "What the Robinson-Patman Act is Doing to Quantity Selling" 34 Advertising and Selling 31, January 1941; Benjamin Werne, "Three Years of the Robinson-Patman Act: Federal Trade Commission Invokes Every Phase and Wins Every Appeal." 189 Printer's Ink 21, December 8, 1939. The Robinson-Patman Guide Book prepared by the staff of the American Institute of Food Distribution, Inc., 420 Lexington Avenue, New York, 1940, is perhaps the best general guide to the application of the Act to various business practices.

The difficulties of enforcing the Act have been truly colossal; almost every business in the United States was affected in one way or another by some transactions that fell within the Act. To quote from the same article of George's:

> "In the slow unfolding of the Robinson-Patman Act we have been favored with a new variety of Arctic night. The six-months show put on by Nature each year, great and venerable though its fame, seems merely puney in comparison with the nigh onto four years of darkness in which one of our major laws has been shrouded. Yet through it all, the lifting process has been steady... There is no blame on that score to be laid at the doors of either the administrative agency or the courts. The job was tremendous. It was on the striking scale that so often accompanies any effort to impose an apparently simple but rigid idea on the immensity and variety of business. In this case the idea--that of keeping price discrimination within reasonable bounds--had to be given a half dozen radically different forms to keep the most commonplace practices from frustrating it at the very outset of its life... We certainly have had nothing like the sweeping changes in the system of distribution that some of the more fanatical supporters of the measure hoped for, but neither do we have the same liberty and license in pricing policies that the violent opponents regarded as sacred. In its own staggering way the law as it has come out of the judicial assembly plant has followed the middle of the road."[51]

Both George and Copeland appreciate the importance of proper administration of the Act. The Act itself is not self-enforcing, except incidentally through a seldom-used provision that gives an injured party the right to sue for triple damages. Neither is it enforced primarily by the executive branch of the government. (For purposes of this study, the so-called Borah-Van Nuys Act, the criminal section, can be disregarded. There is no record of any action having been taken on this section in the five years.) The enforcement of the Act is in the hands

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[51] Idem.

of the Federal Trade Commission, under a form of procedure all its own.

When the Commission has some evidence that a violation of the Act has taken place, either because of a letter or other form of communication from a customer or a competitor who believes he has a cause for complaint, or because the Commission, on its own motion, desires an investigation, the Chief Examiner goes over the preliminary material. If he believes the preliminary matter satisfies all requirements for a complaint, the Chief Examiner sends the application to the nearest field office for investigation by a staff member, who is usually an accountant or an attorney. These field offices are located in New York, Chicago, Seattle, San Francisco, New Orleans, and the main office at Washington. The field investigator goes direct to the company or individual against whom the complaint has been made, and discusses informally the charges and the defense. A report is given to the field office, and by the field office to Washington. The investigator may interview competitors in the trade or customers to see whether competition has been injured, whether the practice is common to the trade, and secure any other information helping to complete the picture. Many a case goes no further. If a complaint is issued, the company may either agree to the facts, or ask for a hearing before a trial examiner. The report of the examiner is reviewed by the Commission before final action is taken. If the company believes its rights have been infringed upon an appeal may be taken to the Circuit Courts.

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In all of the procedure, a wide degree of judgment is called for. The Commission may issue a complaint every time a letter from a crank comes in, it may cause a fight over non-essential matters and trifles, or it may choose the most important evils and concentrate its attention on the cases that will do most to tell the business man what is and what is not allowed.[52]

Between June 19, 1936, and December 2, 1940, the Commission issued 136 complaints on alleged violations of the Robinson-Patman Act. Hundreds of other cases were investigated, and probably thousands of letters were received which did not warrant investigation.[53]

The activities of the Federal Trade Commission have not been free from criticism by conservatives and liberals alike, and the courts had unduly hampered its activities. Recently, however, we have been getting some very encouraging reports of the Federal Trade Commission's activities. Pendleton Herring, after having made a study of the personnel from 1914 to 1940,

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[52] See Administrative Procedure in Government Agencies, Federal Trade Commission, Part 6, 76 Congress, Senate Document 186, Government Printing Office, 1940.

[53] The Annual Reports of the Federal Trade Commission give a summary of the facts each year. For instance, for the year ending June 30, 1939, the Commission reported 173 investigations, with 32 complaints filed. (page 5) Eight hundred fifty three investigations had been started up to June 30, 1940.

reported:

> "Within the last few years the Commission has entered upon its work with increased vitality. There is evidence of collective thought and active leadership. The Robinson-Patman Act and the Wheeler-Lea Act have given the Commission new authority and new responsibility... The Federal Trade Commission, when viewed in terms of its personnel today seems to have reached a happier stage than in any previous years of its activity."[54]

A review of a few complaints and orders of the Commission, selected for their interest rather than for any necessary importance will give concreteness to a study of the Commission's enforcement of the Act. (The docket number is given for convenience.)

Philip Morris was asked to explain why certain dealers were paid for window and counter displays when the same arrangement was not available for other dealers. (3919)

The Corn Products Refining Co. was asked to explain its practice of giving some customers advertising services not available to competitors; the Corn Products Refining Co. was also accused of giving one customer a lower price on condition that he did not buy from a competitor of Corn Products. (3633)

The cosmetic companies have received considerable attention from the Commission. Elizabeth Arden was asked to explain the

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54E. Pendleton Herring, "The Federal Trade Commissioners" 8 George Washington Law Review 338, at 363. Jan.-Feb., 1940. See also "The Effect of the Robinson-Patman Act on the Work of the Federal Trade Commission," 54 Harvard Law Review 670, Feb. 1941.

practice of supplying store demonstrators to some stores, and not to others. (3133)

Complaint 3921 alleged that Liggett and Myers Tobacco Co. gave "free goods" to some customers and not to others; that it allowed the cash discount in 10 days for most customers but extended the period to 60 days for favored jobbers.

Luxor, a manufacturer of toilet articles was ordered to make its ten-cent size available not only to chains but to independent competitors. The company cannot discriminate by making a popular size for one and not for another, if the dealers compete. (3736)

Geographical price discrimination, which was thought to be a thing of the past, was the practice prohibited in 3740, Metz Brothers Baking Company--ten cents for a 24-ounce loaf in Iowa and eight cents for the same size in Minnesota. Union Starch and Refining Co. Sold glucose and corn syrup at different prices in different geographical regions. (3804)

The Hastings Manufacturing Co. (4437) paid some prospective customers exhorbitant sums for the stock of competitors. One of the least justifiable pricing practices complained of is that of giving a price based on the total amount of a certain product used, whether or not the product is purchased in whole or in part from the seller. The purchasers of $50,000 worth of salt were given a special discount on the amount purchased, whether the amount was $5,000 or $50,000. (Morton Salt, 4319; International Salt, 4307)

These cases, selected at random, give an idea of the forms that price discrimination may take.

During the first five years of administering the Robinson-Patman Act the Commission has passed on almost every phase of the Act. Five cases have been carried to the courts, with uniform support of the Commission's interpretation. By studying the five court cases and the dozens of orders of the Commission (some orders and findings cover many, many pages; others only one or two) it is possible to give a general description of the Act.

The purpose of the Robinson-Patman Act is to outlaw certain forms of price discrimination that were based not on differences between the costs of serving different customers, but on their relative bargaining power. Section 2 of the Clayton Act had forbidden price discrimination where the result was a tendency to limit competition or establish a monopoly, but the section had been written to prevent the form of price discrimination used by the old "trusts" of the Standard Oil type--that of cutting the price in one town, until a competitor was starved out, while keeping up the price elsewhere. This type of geographical price discrimination had almost disappeared. Another type of price discrimination had created a problem not subject to the provisions of the Clayton Act which allowed differences in price where the differences could be explained if there was a difference in the quality or the quantity sold. In other words, a small difference in quantity could account for a big difference in price, regardless of the cost of serving the different customers. A chain store, for instance, might buy a tremendous

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quantity of goods, for which it received a quantity price, and at the same time demand frequent deliveries in small quantities to its hundreds of stores, so that there was no saving on the large order over the orders of smaller buyers who bought more at one time than the chain, and paid a higher price.

The Robinson-Patman Act has given a stricter definition of what constitutes price discrimination. A quantity discount is not allowable unless there is some definite saving in the cost in selling in quantity, and the discount may be no greater than the saving affected thereby. The difference in price between different customers must be justified by a difference in the cost of serving them.

In one other respect, the Robinson-Patman Act has tightened up the definition of price discrimination. If there is no injury to competition, and no tendency to create a monopoly, neither the older nor the newer Act prevents a difference in price. The phrase in the Clayton Act "to substantially lessen competition or tend to create a monopoly" provided a most indefinite standard. As interpreted by the Courts until the Van Camp decision[55] this clause was interpreted to mean that there must be an injury to the competitors of the seller, not an injury to the competition between those who bought from the seller. The decision of the

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[55]Van Camp v American Can Co., 278 U.S. 245 (1929). To be discussed in detail in another section.

Van Camp Case, that unjustified discriminations in price are forbidden where unfairness to the buyers results, is incorporated in the Act.

Price discrimination may take many forms. Each type presents its special problems. The simplest, of course, is an outright reduction in price. Another is a discrimination according to the trade status of the buyer, which is not forbidden because a lower price to a wholesaler than to a retailer does not injure the retailer; he does not compete with the wholesaler. If, however, the manufacturer sells at a lower price to a retailer who once sold a few articles on a wholesale basis, and thereby secured the designation of a wholesaler, there is a discrimihation because the "Wholesaler" will sell at retail in competition with the retailer who paid the price charged retailers. A discrimination can be given by an improper classification of customers. Various discounts present the most difficult cases. If one buyer is given 2 per cent for cash in 10 days, and another is given 5 per cent for cash in 10 days, an obvious discrimination occurs. Certain cumulative discounts, based on the total amount purchased over a month or a year, may have no relation to the costs involved. But discrimination need not be limited to the price itself. One seller may be furnished sales helps, in the form of advertising allowances, use of demonstrators or other services; none of these practices is forbidden, but they must be open to all

on a proportional basis.[56]

It will probably be many years before all possible varieties of price discrimination have been adjudicated, but the general purpose of the Law is reasonably clear--no differences in price to different customers, if competition is hurt thereby, unless the difference can be justified by the differences in the cost of serving those customers. One important exception to the principle that differences in cost can justify differences in price is the provision that if the number of possible buyers in a very low price range is small, the Federal Trade Commission may arbitrarily fix the limits of quantity discount, on the ground that there is a danger of monopoly arising from mere size itself. There is no indication that this provision will be used unwisely, judging by past cases coming before the Federal Trade Commission, but the provision is an interesting departure from the philosophy of "size is no offence."

The only provision of the Act which has been tested in the courts to date is the provision prohibiting brokerage allowances. One method of securing a lower price in the past has been through the use of a "brokerage allowance." In its Final Report on the Chain Store Investigation,[57] the Commission had much to say on

[56]See Albert E. Sawyer, "The Commission's Administration of Paragraph 2 (a) of the Robinson-Patman Act: An Appraisal." 8 George Washington Law Review 469, Jan.-Feb., 1940.

[57]74 Congress, Senate Document 4, 1935, Chap. VII.

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the evils of brokerage allowances as a subterfuge for price discrimination. The result was that in Section 2(c) not only is brokerage paid to the buyer by the seller prohibited where the effect is to limit or injure competition, but the provision against payment of brokerage by the seller to the buyer is absolute. This part of the Act has now been tested in all aspects by five cases.[58]

The brokerage cases no doubt are important to the brokers, but it is doubtful whether the brokerage section has any great

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[58]In the matter of Atlantic and Pacific Tea Co., Docket 3031, January 25, 1938; 26 F.T.C.486.
Great Atlantic and Pacific Tea Co. v Federal Trade Commission 106 F (2d) 667 (C.C.A. 3rd, 1939). Certiorari denied 308 U.S. 625 (1940).

Webb Crawford et al. Docket 3214, Webb-Crawford v Federal Trade Commission 109 F. (2d) 268 (1940).

In the matter of quality bakers of America, Docket 3218. Quality Bakers v. Federal Trade Commission, 114 F. (2d) 393, (C.C.A.1, 1940)

Biddle Purchasing Co., Docket 3032. Biddle Purchasing Co. v Federal Trade Commission, 96 F. (2d) 687,(1938) Cert. denied 305 U.S. 634.
Oliver Brothers, Inc. v Federal Trade Commission, 102 F. (2d) 763, (1939)

economic significance. If the brokers were able to insert a provision which requires the use of either an independent broker or no broker, it remains to be seen whether the brokers as a class will gain more from the transactions where brokerage might otherwise have been paid to a "dummy" brokerage house associated with the buyer, or whether he will lose as some of the large buyers find it expedient to buy only from companies that use no brokers, thereby eliminating any question of brokerage discrimination.[59]

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[59]For a discussion of the legal aspects, see S. Chesterfield Oppenheim "Administration of the Brokerage Provisions of the Robinson-Patman Act" 8 George Washington Law Review 511 Jan. 1940.

CHAPTER IV

Effects on Channels of Distribution

Perhaps the most important question on the effects of the Act is the question of its effect on mass distributors. There can be no doubt that the original hopes of the little retailers will not be fulfilled. That, however, does not mean that the Act has no effect on the large scale buyers. As has been seen in our previous discussion the Commission has by no means held that a manufacturer must sell to the little buyer the proverbial "one-twelfth dozen assorted" on the same basis as the buyer of a carload lot. It can also be said that the Commission has not overlooked violations of the discriminations that favored the small man, merely because he is small. The complaints and orders issued by the Commission hit the big A&P and the small broker who thought the laws would not apply to him. Some interesting comments are given by Converse[60] which in the absence of any statistically acceptable surveys, probably represents as realistic a picture as any:

> "At this writing, it is said in business circles that observance varies all the way from abandoning all quantity discounts to paying absolutely no attention to the law. Speaking generally, it is said that large companies have tried to observe the law while small concerns have paid little attention to it. Small concerns seem to feel that government prosecutors will devote their attention to the large companies and will not bother them, at least not until the courts have fully interpreted the law. Government prosecutors would rather shoot elephants than sparrows."

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[60] Paul D. Converse and Harvey W. Huegy, Elements of Marketing New York: Prentice-Hall, 1940, p.740.

A year and a half later, Converse reported that "the general opinion is that the large buyers are getting less price advantage than formerly." The wholesale grocers, Converse found, felt that the Act did not help them. The independents could see no great difference in their position.[61] Nevertheless, the point emphasized above by Converse, is repeated by Feldman--that a violation by a large chain can be more easily detected than a violation by a small independent.

> "A brief word about the economic effects of the RPA... The RPA has unquestionably eliminated some of the buying advantages of the large buying organizations, but it has by no means eliminated them all. As pointed out, the Act permits price differentials reflecting savings in the cost of manufacturing and in selling the goods to particular buyers, and there is considerable doubt in the writer's mind whether the price differentials enjoyed by the chains were ever in excess of these savings in the long run. In the practical application of the Robinson-Patman Act it is frequently possible for small wholesalers to obtain larger discounts than chain stores, chiefly because of the fact that small companies are less likely to be attacked by the FTC... The big chain, being in the limelight, cannot run the risk of violation, while the little wholesaler can afford to take a chance."[62]

The financial agencies have consistently minimized the effect of the Robinson-Patman Act on the chains.[63]

61Converse,"Effects of the Robinson-Patman Act on Quantity Selling." 34 Advertising and Selling, January, 1941, p.31.

62George J. Feldman, "Legislative Opposition to Chain Stores and its Minimization" 8 Law and Contemporary Problems 335, at 346

63Poor's Industry and Investment Survey, Variety Chain Stores, February 27, 1941, p.25-28.

Another section of the Act can be explained more satisfactorily in a brief space. In addition to prohibiting outright price discrimination between buyers who are in competition, as we have seen, the Act also has one provision that forbids the payment of brokerage--the fee usually paid to the special kind of middleman who acts for either the seller in finding buyers, or for the buyer in finding sellers--the Act forbids the payment of "brokerage" where the buyer is his own broker.

At this moment we are interested in the brokerage clause only in so far as its effect on the changing channels of distribution can be seen. Converse[64] reports that after the dummy brokerage cases had been decided, there was an increase in the number of "would be" brokers. Since companies like A&P can save nothing by not paying brokerage to an independent broker wherever the seller uses brokers for any of his trade, the A&P has decided to buy only from those companies who use no brokers. The net effect will probably offset any advantages the brokers may have secured by passage of the Act.

Feldman,[65] who acted as attorney for the A&P in some of its brokerage cases, has little sympathy for the situation in which the brokers now find themselves:

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[64]Converse, 34 Advertising and Selling, 31, op. cit.

[65]Feldman, op. cit. 8 Law and Contemporary Problems 335, at 336.

"The RPA has definitely eliminated the practice of paying brokerage to buyers at least as far as the corporate chains are concerned. Cases are still pending against some of the large voluntary chain organizations to force them to discontinue the acceptance of brokerage. The brokerage section, however, has proved a boomerang against the very group that sponsored it. As interpreted by the courts, this section prohibits any buyer from accepting brokerage. It has been a common practice of ordinary brokers to purchase an occasional car of merchandise on their own accounts for resale to their customers, but when they do this they cease to be brokers on that transaction and become buyers. FTC issued many cease and desist orders on this... A broker must abandon this phase of his business... If this is a bad bed, however, it is one of his own making."

A more important effect of the absolute prohibition of brokerage allowances is the possible effect on the voluntary and the cooperative chains, who often gain their chief buying advantages from the brokerage fees received by them and passed on to their customer-members. That such payments are clearly without the law seems clear from a reading of the cases so far decided, but some uncertainty exists because the Federal Trade Commission's order against Modern Marketing,[66] Purchasing Agent for the large Red and White Chain of groceries, has not yet been handed down. It seems quite probably that the voluntaries will find another way to return savings to their member-customers, since the voluntaries, like the A&P, could buy entirely from those companies who employ no brokers, and hence would not be discriminating against other purchasers if lower prices were

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[66]Docket 3783. No action reported on this case up to June 15, 1941. Complaint issued May 10, 1939.

given to all in place of the brokerage allowance to those who use brokers. The chief loss would then be on the brokers who were displaced by the law they helped enact:

> "Complaint against Modern Marketing, purchasing agent for large voluntary chain for receiving brokerage. If Commission's complaint is upheld, it will apparently be a severe blow to the voluntaries as they depend largely on brokerage commissions for their income. The sponsoring organization may, however, find a way of having the manufacturer give the wholesalers lower prices and then charge the wholesalers for their services. The RPA was advocated as an anti-chain measure,...So far it seems to have hurt the independents as much if not more than the chains. The Biddle and Oliver companies operated to help the independent wholesalers who supply the independent retailers. The limiting of advertising allowances hurt many of the voluntaries, especially the smaller ones which were not big enough to operate warehouses and which were not tied up with wholesalers. There was a decrease in the number of all types of groups and retailers in all types of voluntaries and cooperatives following the passage of the RPA. If the complaint against brokerage fees should be upheld, another blow would be struck at the independents."[67]

Converse believes that one effect of the Law may be to greatly increase private brands. Since the only ruling made so far, that of U.S. Rubber Co.,[68] did not allow a difference in brand as a "difference in quality" under the Act, it is impossible to say what the effect will be on private brands.

The effect on manufacturers, on the whole, seems favorable. There is no doubt that many a manufacturer gave greater volume discounts than were economically justified, and the Robinson-Patman Act has given him a perfect answer to the pressure of the large buyer.[69]

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[67]Converse, Elements of Marketing, op. cit., p.741.

[68]Federal Trade Commission Docket 3685

[69]Grether, Price Control, p.263.

Q. Forest Walker, Economist for R.H. Macey & Co. insists that the manufacturer is getting too much protection:

> "Practical experience with this statute indicates that it is frequently used, particularly in rising markets, as an excuse to deny justifiable quantity discounts. It may well be that these discounts do not lessen competition substantially, but many manufacturers are either unwilling to assume responsibility for proving their validity or simply desire to use the statute to secure higher prices. It is doubtful that the law has conferred any real benefit upon its trade sponsors; and it has undoubtedly raised many prices. It should be promptly revised."[70]

Some possible long-range effects on distributive channels will be discussed in a later chapter. Unfortunately, neither Mr. Walker nor those who deny that the Act will raise prices to the consumer are able to offer anything in the way of proof that cannot be challenged. Perhaps we shall have to wait longer before forming any final judgment.

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[70] Q. Forest Walker, Speech in Cambridge, Massachusetts, March 16, 1940. Reported in 150 Commercial and Financial Chronicle, 1698

CHAPTER V

Price Discrimination in Business Practice: Some Case Studies and Factual Investigations

It has been said that one of the most far reaching effects of the Federal Income Tax Amendment was a forced development of a system of financial accounting that would enable a business man to know how much income he had; when it was necessary to know what charges to depreciation were deductible from the earnings, a method of determining depreciation was a necessity. To business men who are accustomed to thinking of depreciation as just as much a part of the cost of doing business as the cost of hiring labor, it is almost inconceivable that for years the railroads operated without allowances for depreciation.[71] A future business man will probably be equally amazed at the lack of present day information as to the cost of distributing goods through different channels, and in differing quantities. In a number of cases no one was quite so surprised as to the twists and turns that a particular firm's pricing policies had taken than the officials themselves. When one large company that is regarded as being more alert than most was asked to explain

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[71]Professor Clyde Ruggles of Harvard Business believes one of the most serious present day problems of the railroads is due to the lack of provision for depreciation in the days before the Interstate Commerce Commission required that depreciation be figured in as a cost of doing business; because of competition with other means of transportation the railroads cannot now make up for the depreciation which was not properly charged off a generation ago.

certain price discrimination, they said that they could not even begin to; the officials had never given any particular thought to a planned price policy, but just met each situation as it came up with the result that their pricing system was something that like Topsy "just growed."

Whatever the other effects of the Robinson-Patman Act may be, there is no doubt that one of its greatest effects will be the development of methods of analyzing distribution costs. A brief review of some of the important investigations of price discrimination, both before and after the Robinson-Patman Act will help to keep down to earth a subject which is too often discussed in the clouds.

A. The famous Goodyear-Sears Roebuck tire contract.

Sears Roebuck & Co. had not been satisfied with the operation of its tire department in 1926; Montgomery Ward, though a smaller company, did far more tire business. Sears felt that the manufacturers who supplied it with tires could be improved on. An official accordingly sought out Goodyear, the largest tire company in the country in March, 1926. A contract was entered into which provided that Goodyear was to manufacture Sears' tire requirements on a cost plus basis--cost to include manufacturing, shipping, handling, but no selling or advertising costs. To this figure Goodyear was to add 6 per cent profit. Tires were to be the same quality as Goodyear's regular product, but were to have a special tread and a special name--"All-State."[72]

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72 The testimony on the Federal Trade Commission's Investigation on this case covers over 25,000 pages. A condensed summary of 100 pages is given in Docket 2116, <u>In the Matter of Goodyear Tire and Rubber Co</u>.

The contract between Goodyear and Sears carefully specified that Sears was to make no mention of Goodyear in any way. Goodyear's competitors, of course, did their best to inform both their own dealers and Goodyear dealers that Goodyear provided the tires sold by a new and powerful competitor of the old independent dealers, and it has frequently been rumored that the whole crusade leading up to the Federal Trade Company's extensive investigation was prompted by a tire manufacturer who would like to have had the Sears contract himself. Be that as it may, the Federal Trade's investigation was a new method of settling a trade controversy. Prices were checked, dealers interviewed, cost records studied, analyzed, interpreted, reconstructed and reanalyzed. Out of the "trial by cost accounting" came some significant figures: from 1926 to January, 1934, Sears paid a net price of $116,359,367.85 for tires purchased from Goodyear. For the same number of tires sold during the same period independent dealers paid $41,216,788.48 more, or $182,598,399.59. The records show the net realized prices, after making allowances for all differences in costs, by size of tire and dates of sale from 1927 through 1933. That these figures would be challenged by Goodyear is natural, but even if Goodyear is given the benefit of the doubt, its own figures show a discrimination of $12,701,012.65 in the profit made on the sales to independent dealers after allowing for differences in selling cost, (that is, of course, on the same number of tires) and the profit on tires sold to Sears.

Margin Sheet Comparison of Net Billing Prices, Factory Costs, and Distribution Expenses, Goodyear All Weather Brand versus Sears, Roebuck and Co. All State Brand[73]

ALL WEATHER

	4.50 x 21	4.75 x 19	5.25 x 21	6.00 x 21
Net Billing Price	6.66	7.71	10.68	14.75
Factory Cost	3.39	3.89	5.57	7.55
Distribution Expense	2.29	2.53	3.38	4.91
Total Cost	5.68	6.42	8.95	12.46
Net Operating Profit	.98	1.29	1.73	2.29

ALL STATE

	4.50 x 21	4.75 x 19	5.25 x 21	6.00 x 21
Net Billing Price	4.04	4.60	6.54	9.11
Factory Cost	3.51	4.01	5.76	8.06
Distribution Expense	.28	.30	.37	.48
Total Cost	3.79	4.31	6.13	8.54
Net Operating Profit	.25	.29	.41	.57

The chart is interesting in that it shows a very great saving in distribution costs of selling direct to Sears; the objection was not that Sears got the benefit of the full saving, but that it received much more than this saving. It is also interesting to note that the manufacturing cost was higher on tires made for Sears. This higher cost of manufacturing was largely due to Sears' habit of doing heavy buying during the months when production was heaviest.[74] Deliveries were often for five or six tires going to one store of Sears and did not differ from run-of-the-mill deliveries to smaller customers.

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[73]Source: Goodyear's own figures. Docket 2116, p.52

[74]Ibid., p.59. Evidence not too clear on this point.

Sears paid on an average of 29 per cent to 41 per cent less for the same tire, after allowing for differences in all costs except selling costs. If full difference in selling cost is allowed, the net discrimination is 11 to 22 per cent. Sears, in turn, sold at 25 per cent to as much as 35 per cent under the prices of independents. The complaint was not that Sears undersold the independents, but that Sears could undersell because of its buying advantages not justified by differences in cost. A tire dealer operating on a 22¼ per cent margin was not in a very good condition to meet a cut of 25 per cent. The commission found that the net effect was to reduce competition by eliminating the independent competitors. Competitors of Goodyear took over the business of one independent after another, and operated these outlets as company stores in order to save their business. These manufacturer's stores were operated at a loss.

Of the many interesting phases of this case, none is more remarkable than the total neglect of the immediate interests of the consumer. There can be no doubt that competitors were injured, nor can there be the slightest doubt that the consumer got far more for his tire dollar. The case illustrates perfectly the prevailing philosophy that competition by itself is able to serve the consumer's interest; that the public must be served by keeping many competitors in business so that the rivalry between competitors will save the consumer from the necessity of buying from a monopolist. At the same time, it is worth noting that the competitor who does drive down prices to the consumer can be open to severe public censure. Further analysis

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on the conflicting duties of competition is interesting, but beyond the limits of this discussion.

Goodyear was protected by contract from having to increase its plant to take care of temporary demands of Sears by the proviso that while Goodyear would furnish Sears requirements, those requirements would not exceed 25 per cent of its total business. Goodyear did not expect to do all its business with Sears; it depended on its independent outlets for 75 per cent or more of its sales; but to get the 25 per cent or less it made competition very difficult for the dealers who sold the 75 per cent. The provision that Goodyear should not be compelled to provide more than 25 per cent is probably explained by a practice of large buyers of increasing the per cent of total output of a given manufacturer until that concern, by neglecting its other markets has put itself in a position where it finds it difficult to turn down <u>any kind</u> of an offer from the large buyer. When the arrangement had been in existence for several years, General Wood, President of Sears, announced that he thought he could do better with some unnamed company, and was therefore about to give notice that the Goodyear contract would be cancelled when the due date for cancelling arrived. Then, in order to induce Sears not to cancel, in a separate agreement that was not reported to its stockholders, Goodyear gave Sears 18,000 shares of no-par stock (for which it had previously paid over $1,000,000) plus $800,000 in cash which Sears was to use in buying more Goodyear stock.

That the low prices being given to Sears were not prices Goodyear would care to defend openly is proved, first, by Goodyear's vigorous denial that it sold any tires to Sears; second, by the contract provisions for secrecy as to the source of the tires; and, third, by the granting of the highly unusual bonus of cash and securities equal to over $1,200,000.

The Commission ordered Goodyear to discontinue its discrimination in prices between Sears and other customers, to the extent that the differences were not a reflection of Goodyear's saving in cost on the Sears' business. Goodyear could remove this discrimination either by lowering its price to others or by raising its price to Sears.

Goodyear carried the case to the courts. After some delay, the Court of Appeals held that there was nothing in the Clayton Act to prevent a discrimination in price between two buyers, as long as there was a difference in quantity purchased. The court held with Goodyear that under the Law as it was before 1936 there need be no relation between the reduction in price and the reduction in cost to the seller made possible by the increased quantity. In the meantime, however, the Robinson-Patman Act had been passed, and both the Commission and Goodyear agreed that the contract was a violation of the price discrimination provision of the Clayton Act as amended by the Robinson-Patman Act.

The court seems to have been correct in its contention that Congress did not have this type of price discrimination in mind when the Clayton Act was passed; the only type of price discrimination which had come to the attention of the legislators was the

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old trusts' practice of cutting prices in one locality to drive out a competitor, while holding up prices in the areas where competitors were less bothersome.[75] The Commission has recently brought to light a number of instances where this type of geographical price discrimination is still prevalent, but geographical price discrimination is no longer an acute problem for public policy. While Goodyear was held not to have violated the law, the publicity of this type of a price structure, favoring the outlets that could exert the greatest bargaining power, was one of the big reasons for changing the law.

The attitude of the Commission towards large buyers is well expressed in a few paragraphs taken from the one hundred page summary in the Goodyear case.[76]

> "The practice of giving large and powerful purchasers a disproportionately large discount is not justified. Such a discrimination, when made merely on account of size, tends toward monopoly and the suppression of competition. If the quantity proviso be interpreted to mean that a manufacturer can discriminate with respect to quantity sales to any extent he desires, the section would be rendered meaningless and ineffective. It is clear that the quantity proviso can only have been intended to preserve to the large buyer the inherent economies of large purchases and does not give a manufacturer a license to grant him a favored price without restraint. Quantity discounts are exempt because such a discount involves some economic utility that should be preserved."[77]

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[75] Studies of legislative history of Clayton Act by John Perry Miller, in his Unfair Competition, Cambridge: Harvard University Press, 1941, p.130. This book, just published, is one of a series of three on Harvard Studies in Monopoly and Competition.

[76] Docket 2116, pp.93,94,95.

[77] Docket 2116, p.93.

This following statement is noteworthy:

"...A manufacturer, under the Clayton Act, is under a duty to comply with the law, [and he may not make his bargains according to his own interests by discriminating as he pleases, however honest and however justifiable such course might be from the standpoint of commercial principles.] Large industrial companies, through price discrimination, can control competitive business conditions among their customers to the extent of enriching some and ruining others. Under the Clayton Act, a manufacturer has no right to put dealers to any such destructive disadvantage by any unjustified discrimination. While a manufacturer has an interest in making attractive offers, in order to secure as much business as possible, it is, however, an interest which can only be consulted and acted upon in subordination to law. When one discriminates in price between competitors he reduces the price to one or several of them. Competition limits the selling price. When a competitor is given a lower price it follows that his profit has been increased by just the amount of that reduction. It equally follows that every competitor has been put to a disadvantage in just that sum...[78]

"In this case there is a price discrimination in favor of Sears, Roebuck and Co. which gives it an unfair competitive advantage, thereby producing an unjust competitive situation between it and the independent tire dealers. The discrimination is not grounded on efficiency and cost. It is the opinion of the Commission that no justification exists for this discrimination or method of competition."[79]

The Goodyear case, coming as it did when the subject of price discrimination was receiving the attention of Congress in the hearings leading up to the Robinson-Patman Act, was taken as an authoritative statement of the position of the Federal Trade Commission. The Commission's contention as to what it would like to have the Clayton Act mean was effectively given the effect of law in the new amendment.

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[78] Ibid, p.94.

[79] Ibid, p.95.

B. The Federal Trade Commission's Chain Store Investigation.

In December, 1934, the Federal Trade Commission filed with the Secretary of the Senate its Final Report of the Chain Store Investigation.[80] This was the summary of 33 different reports on various phases of the Chain Store investigation conducted at the request of Congress.[81] This investigation produced the most complete report on the chain store development in general, and of price discrimination in particular, that has ever been made. Congress had asked the Federal Trade Commission for a report on the dangers of monopoly inherent in the tremendous growth of the chain organizations and had asked for answers to specific questions. On most question, such as the question of whether the chains were guilty of cheating on weights and measures, or under paid their help in comparison with the wage scales in the independent stores, the Federal Trade Commission gave the chains a clean bill of health. The Commission believed that it would be unwise to strangle the development of chains by chain-store taxes, because they found that the chains did bring about a reduction in retail prices. The report found that chains competed vigorously with each other as well as with the independents. While

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[80] 74th Congress, 1st Session, Senate Document 4. Superintendent of Public Documents. Published 1935. Serian number 9896.

[81] 70th Congress, Senate Resolution 224, 1928. Reproduced in full in Final Report, 2.

there was as yet no real monopoly, the Commission believed that if the present trend toward chains continued, there was a real danger of monopoly, at least in some geographical areas, in the future. How to check this possiblility without sacrificing the savings to the consumer was the problem.

The one aspect of the chain store question which seemed most dangerous to the Commission was the ability of the chains to buy from manufacturers at discounts that were based not only on the admitted savings to the seller of doing business the way the chains operated, but discounts that could be accounted for only by the superior bargaining power of these large buyers. Large chains bought more cheaply than small chains, and small chains bought more cheaply than independents. The Federal Trade Commission believed that the greatest single advantage of the chains was due to its buying advantages, not its operating efficiency. This finding is disputed by such authorities as McNair[82] who places much more emphasis on the economies produced by such factors as better management, integration of wholesale and retail functions, etc., and Phillips.[83]

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[82] McNair, op. cit., 4 Law and Contemporary Problems 334, at 343.

[83] Charles F. Phillips "An Evaluation of Large Scale Retailing With Emphasis on the Chain Store" in Governmental Market Barriers 8 Law and Contemporary Problems 348, at 349. (Spring 1941)

"McNair is perfectly correct in stating that 'integration of functions rather than large buying power is the principal source of chain store economies'".

The report disposes of the idea that the large buyers used "threats and coercion" to get lower prices. These threats were reduced to statements that if the chains did not get the merchandise at their own price, they would not buy from that seller.[84] While the Commission found that "in seeking to buy at the lowest possible cost the chain does only what the independent does but its size and bargaining power are such as to make its efforts yield far better results than those of the independent."[85]

The Commission felt that there was nothing either unfair or illegal in the buying practices of the large companies, but that if potential monopoly power of the large chains was not now subjected to some check, there would come a day when competitors would be eliminated. If one follows the reasoning that the chains would eliminate all or most of their competitors, there is no doubt that some action was called for. It might well be argued that chains seem totally unadapted to certain types of trade, so that the independent would never be replaced completely.[86] Whether or not the conclusions of the Federal Trade Commission are right, in its report it did bring to light market practices, particularly price discrimination practices, that could not exist except in the dark.[87] Secrecy seems to be one of the first

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[84]Chain Store Report, op. cit., p.24.

[85]Idem.

[86]See, for instance, discussion in Alexander, Marketing, op. cit. p.247, on this subject. Many authorities believe the chains had reached the greater part of their growth before legislative restrictions appeared.

[87]In addition to the material in the Final Report, see Special

requisites for the existence of the grosser forms of price discrimination.[88]

The two investigations briefly reviewed above dealt with price discrimination before the passage of the Robinson-Patman Act. The next two cases arose since the Act was passed.

C. Bird and Son, Inc., Montgomery Ward & Co., Inc.

Shortly after the passage of the Robinson-Patman Act a complaint was issued against both Bird and Son for giving, and against Montgomery Ward for receiving a discount of 14 to 18 per cent more than the discounts given to retailers. The case came up for trial before an examiner; as the evidence clearly showed that there was a difference of more than 14 to 18 per cent in the respective costs of selling to retailers and to Montgomery Ward, the complaint was dismissed. Because of the extreme simplicity of this case, it is important only in showing that discriminations as such are not forbidden when there is a justification in the cost of doing business with different outlets.[89]

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[87] Discounts and Allowances to Chain and Independent Distributors-Grocery Trade--one of the special volumes dealing with one particular part of the Federal Trade Commission's Chain Store Inquiry. 73 Congress, 2d Session, Senate Document 89. Washington 1934.

[88] See Reinhold P. Wolff's "Monopolistic Competition in Distribution" op. cit., at 313. He treats the subject of buying advantages of large distributors in a different light.

"The Law enforcing agencies were committed to a theory of price equilibrium which did not take cognizance of the phenomenon of 'monopsony' on the buying side of the market. But the people in Main Street frequently had a more realistic conception of the threat of large scale enterprise, and made energetic efforts to reverse public attitude."

[89] Docket 2937.

D. Standard Brands Case.

By far the most important case that has arisen under the Robinson-Patman Act up to the present time is the Standard Brands Case. The report on this case covers fifty pages, and has been referred to by members of the Commission as the best statement on the part of the Commission as to the method of cost analysis the Commission will use in the future. The investigations involved required three years time; the original complaint was issued November 21, 1936, and the final order to cease and desist was not issued until June 15, 1939.[90]

Standard Brands sells about 120,000,000 pounds of yeast annually. This is from 55 per cent to 65 per cent of the yeast manufactured and sold in the country. Through its 16 sales divisions and 444 selling agents, it does business with customers in almost every town in the United States having a bakery. Yeast is necessary to make bread. One pound of yeast is used for each 75 to 125 pounds of bread. Some bakeries are very large. The A&P has 38 bakeries, and uses 5,000,000 pounds of yeast a year to make bread for its thousands of stores. Continental Baking Co. uses another 5,000,000 pounds of yeast, while General Baking Co.

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[90] Docket 2986, 29 Federal Trade Commission Decisions 121. This case has been referred to by the members of the commission and its staff. See remarks of E.L. Davis, Chairman of FTC, address before American Institute of Accountants, Memphis,Tennessee, Oct. 18, 1940. "Federal Trade Commission Procedure with Particular Reference to Accounting," p.7. The case is discussed by Professor F. Taggart at great length in 21 Bulletin National Association of Cost Accountants 195-262. A shorter discussion is that of J. Brooks Heckert, Analysis and Control of Distribution Costs, New York: Ronald Press, 1940, p.405-416. For an excellent statement of the Commission's views and methods on Cost Accounting, see "Address of Hon. Robert E. Freer, Commissioner, "Accounting Problems Under the Robinson-Patman Act". Before Phil. Chap. Penn. Instit. of Public Accountants, March 24, 1938, mimeographed.

uses about 4,000,000 pounds. But there are 28,000 bakeries in the United States.

The price schedule of Standard Brands was found discriminatory in several ways. It is not surprising that the large chain bakeries were able to get a quantity price for all members of the chain. Suppose there were two bakeries, side by side, one a chain, the other independent; each uses exactly the same amount of yeast. The independent pays 25 cents a pound; the chain, taking deliveries in exactly the same amount, pays 14 cents a pound because the total requirements of all the outlets of this organization reach $50,000 a month. Where deliveries are important, because of the highly perishable nature of yeast, it is impossible to prove that there is any such difference as 9 cents a pound in the cost of serving these two dealers.

The initial discrimination in favor of the chain is only the beginning. We assumed in the illustration above that the chain bakery actually did use the same amount of yeast as its neighbor; actually, it was possible for the chain to buy ohly a small part of its requirements from this one seller, and to still get a lower price by far than the neighbor who bought all his supplies from thБ seller; this strange result was made possible by a system of quoting prices not according to the amount the chain purchased from Standard Brands, but the amount of yeast <u>purchased</u> <u>from</u> <u>all</u> <u>sources</u>. The explanation is probably something like this: one yeast company was selling most of the requirements of a given chain organization; another yeast manufacturer wished to get some business from the chain, and in order to get

uses about 4,000,000 pounds. But there are 25,000 bakeries in the United States.

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The initial discrimination in favor of the chain is only the beginning. We assumed in the illustration above that the chain bakery actually did use the same amount of yeast as its neighbor; actually, it was possible for the chain to buy only a small part of its requirements from this one seller, and to still get a lower price by far than the neighbor who bought all his supplies from the seller; this strange result was made possible by a system of quoting prices not according to the amount the chain purchased from Standard Brands, but the amount of yeast purchased from all sources. The explanation is probably something like this: one yeast company was selling most of the requirements of a given chain organization; another yeast manufacturer wished to get some business from the chain, and in order to get

it, had to meet the lowest price the chain could get if it kept all of its purchases with one supplier.

In this way it was possible for one chain to pay many thousands of dollars per year less than its independent neighbor paid for exactly the same quantity. If was, of course, impossible for Standard Brands to prove a saving in the cost of delivering three hundred pounds to Chain A, at 14 cents per pound, while selling to the neighboring independent twice that quantity at 21 cents per pound. There was only one reason for the difference, and that reason was the superior bargaining power of the chain. This discrimination in the cost of yeast was found to have an unfair effect on the ability of the independent and the chain bakery to compete in the sale of bread. The food industries operate on an extremely small margin of profit, so that very slight differences in buying cost can make a big difference in ability to compete in the market for the final product.

As an example of the narrow margins on which the food distributors operate, the recent order against Standard Brands, on its other yeast product, the foil yeast sold to individuals, the company was unable to show a justification in cost savings of selling at 27 cents per dozen to retailers who took 300 units per week or over, and 30 cents per dozen for retailers who took less than 300. The company could justify prices of 28½ cents and 30 cents for those same classifications.[91] (Delivery must be made to one store.)

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[91] Docket 2986, Release of May 8, 1940.

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In this way it was possible for one chain to pay many thousands of dollars per year less than its independent neighbor paid for exactly the same quantity. It was, of course, impossible for Standard Brands to prove a saving in the cost of delivering three hundred pounds to Chain A, at 16 cents per pound, while selling to the neighboring independent twice that quantity at 21 cents per pound. There was only one reason for the difference, and that reason was the superior bargaining power of the chain. This discrimination in the cost of yeast was found to have an unfair effect on the ability of the independent and the chain bakery to compete in the sale of bread. The food industries operate on an extremely small margin of profit, so that very slight differences in buying cost can make a big difference in ability to compete in the market for the final product.

As an example of the narrow margins on which the food distributors operate, the recent order against Standard Brands, on its other yeast product, the foil yeast sold to individuals, the company was unable to show a justification in cost savings of selling at 27 cents per dozen to retailers who took 500 units per week or over, and 30 cents per dozen for retailers who took less than 500. The company could justify prices of 28½ cents and 30 cents for those same classifications.[91] (Delivery must be made to one store.)

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[91] Docket 2986, Release of May 8, 1940.

E. The Simmons Co.

Some methods of granting price discriminations are found in the Simmons Case.[92] Discounts based on the total amount of goods purchased, not at one time, but during a month or a year are called cumulative discounts. The Commission has found that generally there is no saving connected with the amount purchased over a period of time, as contrasted with the quantity purchased at one time. Simmons granted a cumulative discount to individuals and to members of buying groups. The Commission gives as examples:

> "An individual customer buying $10,000 worth of Simmons goods in a year may receive no discount while a local competitor purchasing only $1,000 worth gets a discount of from three to five per cent because it is allied with a syndicate head (a group of individuals, corporations, cooperative corporations or associations treated as a single customer.) Yet, the Simmons salesmen may call upon the affiliated individual customer as often as upon the unaffiliated individual customer, soliciting orders from and making deliveries and extending other facilities to both in the same manner.
>
> "An individual customer purchasing $10,000 worth of merchandise in a year and receiving a three per cent discount because of being a member of or allied with a syndicate head, the purchases of all of the members of which aggregate more than $50,000 but less than $75,000, may compete with a local dealer purchasing but $1,000 worth of Simmons merchandise in a year but receiving a five per cent discount because of being affiliated with a syndicate head, the purchases of all the members of which aggregate more than $200,000. Yet orders, deliveries and other facilities are extended to both in the same manner while the average size of the deliveries to the $10,000 individual customer getting the smaller discount is apt to be larger than that of the $1,000 customer receiving the larger discount.
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> "Rebates or discounts from published prices for standardized products paid by Simmons were found to aggregate more than $500,000 in 1936; approximately $750,000 in 1937 and more than $485,000 in 1938.

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[92]Docket 3840, May 39, 1939.

CHAPTER VI

Towards a One-price Policy in Non-retail Sales?

Lest it be inferred that the examples of price discrimination discussed above represent an example of business conduct below the standard required by the mores of the time, it should be clearly understood that the words price discrimination are there used to explain economic facts, not to express moral judgments. There is nothing either good or bad about price discriminations as such. The surgeon who charges a rich patient a thousand dollars for a simple operation, and does not get back the cost of his telephone calls from a poor patient who required the highest degree of surgical skill is discriminating in his prices. As Joan Robinson[93] has said: "From the standpoint of society as a whole it is impossible to say whether price discrimination is desirable or not." John Maurice Clark, in his famous Studies in the Economics of Overhead Costs,[94] has an excellent chapter on "Discrimination in the Modern Market." Clark says:

> "Discrimination is not solely an economic fact. It raises moral and social issues; it is the tool of favoritism and greed and the vehicle of the highest social justice. It may rouse our righteous resentment or our admiring commendation. So far as overhead costs are concerned, the role they play is passive; they permit discrimination; the pursuit of maximum profit impels men to discriminate, and most of the other motives known to man join in at one time or another, playing a part and modifying the character of the result."

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[93] Joan Robinson, Economics of Imperfect Competition, London: Macmillan, 1938. See Chap. 15, "Price Discrimination."

[94] University of Chicago Press, 1923. See Chap. XX, 416-34.

For a definition, we may as well accept that of Joan Robinson,[95] whose chapter on "Price Discrimination" is much quoted:

> "The act of selling the same article, produced under a single control, at different prices to different buyers is known as price discrimination."

Public policy need not, and probably cannot, prohibit price discrimination. Price discrimination can produce desirable or undesirable social effects, with or without an evil motive on the part of the discriminator. Public policy is interested in the control of price discrimination when its results become undesirable. In the past, price discrimination has been looked upon as a tool used to achieve a monopoly position. It is now quite generally recognized that price discrimination is first of all, an evidence of the possession of some degree of monopoly power. To quote Joan Robinson[96] again:

> "Under conditions of perfect competition price discrimination could not exist even if the market could be easily divided into separate parts. In each section of the market the demand would be perfectly elastic, and every seller would prefer to sell his whole output in that section of the market in which he could obtain the highest price. The attempt to do so, would, of course, drive the price down to the competitive level, and there would be only one price throughtou the whole market."

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[95] Economics of Imperfect Competition, p.179.

[96] Joan Robinson, op. cit., p.179.

Clark, who wrote his Economics of Overhead Costs[97] in 1923, before the newer definitions of monopoly were given by Chamberlain[98] and Joan Robinson, says that discrimination need not be connected with monopoly. The difference, no doubt, is mainly in the definition given the word "monopoly" in 1923 and 1938. Clark goes on to say that price discrimination is

> "a natural result of overhead costs, and is found in practically every phase of business. Sometimes it is due to close figuring of costs and keen pursuit of profits; sometimes to ignorance of costs or failure to allocate them. It needs no elaborate explanation; rather, when it is absent, its absence needs explaining."[99]

The Oriental trader who expects to get the equivalent of ten dollars from the poor bargainer, but only five from the man who can match him in ability to "higgle," clearly has a discriminatory price policy. We often speak as though we had a completely non-discrimanatory price policy in our retail stores, because, unlike our grandfathers, we do not "higgle " over the price to be paid for a suit of clothes--we pay the "one price" or refuse to pay it. There can be, and is, much discrimination in retail pricing. A department store that prides itself on its "one-price policy" buys Bayer's Aspirin, and the identical product which it

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[97]p.433.

[98]Edwin Chamberlin, Theory of Monopolistic Competition, Cambridge: Harvard University Press, 1938 Edition, see his comments on this chapter of Clark in his introduction, p.4

[99]Clark, op. cit., p.433.

sells under its own name. One customer pays 49 cents, the other 39 cents. Whether or not price discrimination should include the practice of a retail store in charging what Watkins[100] calls "market-minus" prices for goods on which the customer is inclined to compare prices and "market-plus" prices on the articles on which comparisons are more difficult depends on one's use of the word.

"Higgling" has disappeared from some sectors of the retail market, but not from all. Few men pay the asking price for a Chevrolet or a Cadillac. Real estate men have an "asking" and a "will take" price on a house. The Chevrolet may not vary its printed price, but the trade-in allowance makes an outright price variation unnecessary.

It is not possible to say that retail dealers exercise no discriminatory prices; it is possible to say that every one knows what price he must pay, and can put himself in a class to take advantage of any class price. Let us say that Bayer's Aspirin is available in a full service old line drug store at the corner for 50 cents. The druggist will deliver, and will extend credit. The "regular" chain druggist across the street carries Bayer's Aspirin at 45 cents, and in addition also carries aspirin manufactured by the same company, but put out under the label of the chain druggist at 39 cents. The "cut rate" druggist

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[100] Myron W. Watkins, "Price Discrimination" in 12 <u>Encyclopedia of the Social Sciences</u>, 350,352. Macmillan, 1934.

down the street will, if you insist, sell Bayer's at 29 cents, but will attempt to sell you a product exactly the same not made by Bayer, under his own label, at 19 cents. The individual customer may elect to pay 50 cents if he wishes, or he may pay less. To say that there is no discrimination here is to misuse words, but nowhere in this type of dealing is there the special concession to one of a class of buyers, none of the secrecy that was evident in the pricing at the wholesale level. Lack of "higgling," then, does not mean a fixed price, or rigid price throughout an industry.

Is "Higgling" or Haggling Necessary?

One of America's best authorities on merchandising, Melvin T. Copeland,[101] Believes that we have passed the stage where higgling is necessary in either the retail or the wholesale market. Two of Professor Copeland's colleagues,[102] E.P. Learner and Nathan Isaacs, believe that haggling is necessary, and that the ultimate consumer need not "haggle" only because the "haggling" is done for them by the retailer when he buys from the producer. (Learner and Isaacs use the word "haggling;" Copeland, in the same issue of the Harvard Business Review, uses "higgling." Copeland believes that higgling was all right in the seventeenth and eighteenth c@ntury agricultural eras, but that the modern

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[101] The Problem of Administering the Robinson-Patman Act 15 Harvard Business Review 156, (Winter 1937)

[102] The Robinson-Patman Law, op. cit., same issue, p.137ff.

producer is interested in a smooth flow of goods. If the customer must higgle over each transaction, he places his orders now and then.

Copeland's colleagues ask[103]

> "But how can we check haggling without checking competition? Have we not thrown out the baby with the bath water"?

To the last question, we may say that a one-price policy of Druggist A is a long way from a one-price policy for all retail druggists. If Druggist A's prices are so high that Customer A refuses to pay them, Customer A may go to Druggist B, whose prices are lower. Perhaps Druggist A must lower his price; if he does so, not only Customer A, but B, C, and D will get the same lower price.

The Robinson-Patman Act applies somewhat the same principle to non-retail selling. If manufacturer X sells a given product at a low price to Retailer X, he must allow Retailer Y to buy at the same price if Y is ready to buy the same quality and quantity. (Manufacturer X may, of course, refuse to sell Retailer Y at any price--each seller may choose his customers.) If Retailer Z wishes to buy under different terms than X and Y, and Manufacturer X will be able to show a real saving on Z's order, there is nothing to prevent Z from getting any discount that Manufacturer X can justify on a cost basis. To this broad outline, there are several exceptions: if the number of possible buyers in certain top

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[103]Ibid. p.139.

categories is very small, the Federal Trade Commission has the right to fix quantity limits beyond which further price reductions may not be given, even if otherwise justified. The Act is not applicable to intra-state business, and the Act is not applicable unless there is an injury to competition. If a seller deals with a wholesaler and a retailer, prices need not be the same even if no justification in cost can be shown, because there is no competition between different levels of trade.

It is generally conceded that the "one-price policy" in retail trade has made possible a more efficient distribution system; the time of both the buyer and the seller is conserved. Is it necessary for manufacturers and wholesalers to do business on another basis? Copeland has long been an advocate of a one-price policy. In his Principles of Merchandising,[104] published seventeen years ago, Copeland objected to such devices as quoting prices less 60-10-10-10-5 to one customer, and 60-10-10-10-5-5 to another. The author believed that the chief value of that type of price quotation was the questionable advantage of making the differences in the quoted prices less easily discovered. As long ago as 1924, Copeland found little justification for an extra 2 per cent given to a big retailer as a matter of good will. Quantity discounts given on all purchases in a given period of time, as distinguished from quantity delivered at one

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[104]Melvin T. Copeland, Principles of Merchandising, New York: Shaw, 1924, Chap. XI, "Price Policies,"

time was a matter of "carrying favor with large customers." Copeland tells of the experience of a paint manufacturer:[105]

> "Our price for tinted glass paint is $1.35 a gallon. With some dealers, at the discretion of the salesman, this price may be dropped to $1.30 a gallon. In exceptional cases a price of $1.25 may be quoted; but should the case be very exceptional, the price may be made $1.20; and if extremely exceptional, even as low as $1.15."

A two-price policy on the part of a retailer is now almost unjustifiable, and a two-price policy on the part of a wholesaler has little to be said in its favor. The problem of the manufacturer is not so simple. The retailer's customers are generally in the same class--i.e., purchasers in small quantities for ultimate consumption. The manufacturer may sell to ultimate consumers, to retailers, to wholesalers, to other manufacturers. No one is asking that he must give the same price to customers who may demand a variety of services at a variety of costs; the manufacturer is told that his prices must not discriminate against one member of a given class. But in addition to this difference in the classification of his customers, the manufacturer also has the problem of overhead costs and the accounting problems that go with overhead costs. It may happen that a manufacturer will sell goods to a big buyer for less than their true cost because this added volume of business will make it possible to make up the difference on his regular orders. To use Alexander's[106] illustration:

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105 Ibid., p.360

106 Alexander et al, Marketing, op. cit., p.387.

"This seeming impossibility arises from the prevalence of overhead costs. Consider this situation: a manufacturer has overhead expenses amounting to $600,000 a year. His annual capacity is a million units, though he is able to sell only 600,000 to his regular customers, the wholesalers and retailers. His direct costs are $1 per unit. He must charge somewhat more than $2 per unit for all goods sold to his regular customers. Suppose a chain offers to buy from him 400,000 units a year. If he computes his overhead upon the same basis as before, his costs are $1.60 a unit ($1 direct and 60 cents overhead.) He can afford to sell the chain system for even less than the $1.60, provided he can continue to dispose of 600,000 units to the wholesalers and independent retailers at $2 or thereabouts. As a matter of fact, under such circumstances it will be profitable for him to sell to the chain system for any price he is able to get above $1, his direct costs. All excess above that figure can be applied to reduce the overhead or can be considered as profits."

It is easy to see how a price of anything over a dollar to the buyer who came after the regular customers had paid the year's overhead can unjustly enrich the last buyer at the expense of the others. This system of charging no overhead on a particular order is definitely outlawed by the words of section 2(b) of the Act. The seller may pass on only the saving due to the particular order as part of the entire production of the plant. If it had not been for the purchasers of the original 600,000 units, it would clearly be impossible for the new buyer to be offered any such price.

Perhaps the greatest single force tending towards a less arbitrary price structure is the new possibility of requiring publicity of price discounts. The Act does not require any public announcement of prices, but since any one can make a complaint which may lead to an investigation by the Federal Trade Commission, it behooves the manufacturer to be able to

show a price system that will stand the light of day. If regular customers of a given concern find that someone else is getting the same product at much less money, there is a lot of explaining to do. The competitors of the discriminating firm will not be backward about spreading such news. This new requirement of publicity,[107] indirect though it is, is in accord with business tendencies in other phases of business life. The Securities and Exchange Commission has on file more complete financial reports than have ever before been given out on every company that either has stocks or other securities listed on a stock

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[107]This tendency towards greater publicity of all types of factual data seems too widespread to be a merely temporary matter. Consider the interest in the consumer movement, as an indication of further need for information about quality and contents of merchandise. The best treatment of this subject is that of Kenneth Dameron "The Consumer Movement" 17 Harvard Business Review, 3271, (Spring, 1939) and his "Retailing and Consumer Movements" 5 Journal of Marketing 385, April 1941. Alexander has an excellent chapter (26) "Consumer Problems and the Consumer Movement" in his Marketing 6 op. cit. 661-683. For a wider requirement of publicity, including publicity of prices, see H.S. Dennison, and J. K. Galbraith Modern Competition and Business Policy, New York: Oxford University Press, 1938, Chap. VIII, "Industrial Publicity," expecially 91.

exchange, or has issued any form of new securities since 1933. Copeland has contended that the secrecy behind the objectionable price discriminations is the worst part of a bad system. It leads to suspicion on the part of all buyers that some one else got a better buy. With the tremendous growth in size of many American corporations, with thousands of stockholders, "private business" as it was known in the days of petty capitalism has been for some years a thing of the past in many lines of commerce.

In its larger aspects, the restriction on the ability of the individual firm to give whatever prices its own bargaining power and its own business judgment dictate is in line with a strong tendency towards limiting the freedom of the firm in its actions. Regulation has increased in almost every aspect of business. As to the wisdom or unwisdom of that policy this paper is not concerned, except as it touches the special, limited subject of control of price discrimination. If the writer is allowed an opinion on the wisdom of controlling the limits within which price discrimination may be exercised, he would quote with approval the statement of John Perry Miller:[108]

> "Unsystematic price discrimination in industries where buyers are of equal strength may be tolerated as necessary to induce price flexibility, while between unequals it may be an undesirable practice."

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[108]Miller, Unfair Competition, op. cit., p.408

CHAPTER VII

Some Economic Implications of the Robinson-Patman Act

The Robinson-Patman Act is now the law of the land. For better or worse, it apparently is here to stay. It seems worth while to examine some of the economic implications flowing from the fact that an Act which touches so much of our commercial life at the vital spot of price should be so long in developing a meaning. Some few points seem to stant out.

A. The Robinson-Patman Act has shown how little we know about the complex forces affecting industrial markets.

It is natural that we should devote our attention to production before we devoted our time to distributing the products of that production.[109] In an economy of scarcity, marketing and selling problems are but secondary. For many years both the practical business man and the economist neglected a study of the selling process and selling costs. Under a theory of perfect competition, selling cost does not enter into our calculations.[110]

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[109] The newness of the study of distribution (used synonimously with marketing--not the distribution of economic theory) is well illustrated by the meeting of the American Marketing Association in Chicago over the Christmas holidays. The story of the first marketing classes held in an American College was told by the men who organized the classes. Marketing as a subject goes back practically no farther than 1910. See V Journal of Marketing 4 issued in April 1941 for a collection of these papers.

[110] Albert L. Meyers, Elements of Economics, New York: Prentice-Hall, 1937. p.144-162.
See also Chamberlin, Monopolistic Competition, op. cit. Chap. 8.

When the Robinson-Patman Act demanded an analysis of distribution costs, business man, government employer, and accountant alike had to admit a surprising lack of knowledge.[111]

The lack of knowledge of costs of distribution is only one evidence of our general lack of adequate knowledge of the

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[111]The first book devoted exclusively to costs of distribution seems to be Heckert's Analysis and Control of Distribution Cost, cited supra, Chapter V, which appeared in 1940. Since 1936 many excellent studies have been made on special aspects of the cost problem. The studies of the Federal Trade Commission, begun several years ago when the Commission was convinced by its administration of the Robinson-Patman Act that information on distribution cost was not available, has not been released to date. For other studies, see, for example, Robert Harbeson, "The Cost Concept and Economic Control" 17 Harvard Business Review 257, (Spring 1939) Clarence B. Nickerson, "The Cost Element in Pricing" 18 Harvard Business Review 417, (Summer 1940). Walton H. Hamilton, "Cost as a Standard For Price." 4 Law and Contemporary Problems, op. cit. 321. Ralph D. Cies, "Costing Problems Posed by the Robinson-Patman Act" 17 Harvard Business Review 350, (Spring, 1939.) In the texts on marketing, by far the best discussion is that of Alexander, Marketing, op. cit., chap.23.

market. More important is a knowledge of the type of market we want. For fifty years we have had on the statute books as the statement of our fundamental policy towards our markets, the Sherman Act of 1890. The Temporary National Economic Committee was formed to study the effects of concentration of economic power. To evaluate the Sherman Act and its working was one major problem of the Committee's work. When two distinguished scholars were called on to summarize the Sherman Act, about the only point on which they fully agreed was that the Act had not accomplished the purpose of preventing monopoly. The author of Monograph 16, Walton H. Hamilton,[112] of Yale believed the Act had not succeeded because it had been designed for another age. Another distinguished authority, Milton Handler of Columbia,[113] found that the Act had not succeeded because it had not been enforced.

The same conflicts expressed in the opinions of Hamilton and Handler are combined in no other person than that of the present head of the Anti-trust Division of the Attorney-general's office--Thurman Arnold. In 1937, when Mr. Arnold was a private citizen teaching law at Yale, he could express himself freely. He found the Sherman Anti-trust Act an interesting subject for

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[112] Walton H. Hamilton, Anti-trust in Action, Investigation on Concentration of Economic Power, Monograph 16, Washington, 1941.

[113] A Study of the Construction and Enforcement of the Federal Anti-trust Laws, Monograph 38, 1941. See pp. 1, 100.

his facile pen.[114] Arnold described the Sherman Act as a part of the mythology by which we reconciled the economic needs for big business with our political ideas that we could not have big business. "In order to reconcile the ideal with the practical necessity it became necessary to develop a procedure which constantly attacked bigness on rational, legal, and economic grounds, and at the same time never really interfered with combinations." But shortly after Arnold wrote the Folklore of Capitalism--and possibly because of the fame he achieved in having written it he was appointed to direct a new attempt at enforcing the Sherman Act. Then he wrote a different book in which he took quite a different view of the anti-trust laws.[115]

Enforcement of the Sherman Act then became necessary for the economic salvation of the country.

For several years Harvard Graduate School of Public Administration has conducted a seminar on "price policy." One of the men who helped to conduct the course summed up the present state of our knowledge of industrial markets, when he wrote:[116]

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114 Thurman Arnold, Folklore of Capitalism, New Haven: Yale University Press, 1937, especially Chap. IX, "The Effect of the Anti-trust Laws in Encouraging Large Enterprises."

115 Bottlenecks of Business, New York: Reynal and Hitchcock 1940.

116 Wallace, "Industrial Markets" op. cit. p.99.

"Acquaintance with the work done in this field by economists, government officials, business men, and others leads to the conclusion that there exists at present no body of knowledge adequate to support a comprehensive program of public policy of <u>any</u> sort toward the industrial markets. The best that we can hope for in the immediate future is that what knowledge we have will be used to avoid mistakes in policy and to make a few constructive changes.

"It appears that there is no general agreement, even among economists, on a central set of issues in this field, to say nothing of diagnosis and proposals for policy."

If we don't know what sort of a market we need, obviously, we are in no position to be very dogmatic about what is good and bad in policies that promote certain marketing policies. As to the anti-trust laws in particular, Wallace[117] reported:

"It has been repeated with pardonable monotony that we have never really tried to enforce the anti-trust laws. A more pointed observation is that we have never really tried to find out what sort of laws should govern industrial organization and business practices."

A hopeful sign is that there has been more attention given to the study of the market in the last decade than at any previous time. There is no one book which has won anything like universal acceptance even in its diagnosis of the problem, much less its prescription for a cure. Among the more important books, one should probably begin with the exhaustive study of Arthur Robert Burns in his <u>Decline of Competition</u>.[118] The question might be raised as to whether a better title would be <u>The Decline of</u>

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117 Wallace,"Industrial Markets" op. cit. p.59.

118 New York: McGraw-Hill, 1936.

Competition as a Regulative Force, rather than The Decline of Competition. Like the study directed by Gardner Means in The Structure of the American Economy.[119] Burn's work goes farther to prove that there has been a change in the direction in which competition is working than to prove that competition itself has declined. The excellent Monograph Number 1 of the TNEC, Price Behavior and Business Policy[120] emphasizes the need of caution in forming conclusions about the intensity of competition. It is quite possible for three big automobile companies to compete more savagely than fifty small companies. One theme does run through all three studies, and that is that the market does not work as automatically as we were likely to think it did before case by case studies were inaugurated. Burn's thesis is that the number of firms in many industries has so greatly decreased that it would be illogical for any firm to form a price policy without regard to the effect of that firm's price policy

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[119] Part 1. National Resources Committee, Washington, 1939.

[120] 76 Congress, 3 Session, Investigation of Concentration of Economy Power, Washington, 1940, written by Saul Nelson and Walter Keim under direction of Edward S. Mason.

on the market.[121] Since all theories of perfect competition are

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[121] Arthur Robert Burns, The Decline of Competition, New York: McGraw-Hill, 1936. For short summary of Burn's position, see especially pp.40,41,42.

"The characteristic of industrial organization during the present century is the growth of firms large enough in relation to their industries as a whole for it to be irrational for them to disregard the effect of changes in their output, or their price policy, upon the market as a whole; they must take account of the effect of a reduction in price not only upon the volume of their sales but also upon the total revenue from these sales. They find themselves in the position of a monopolist in that, in pursuit of the maximum of income, they must choose the best combination of price and sales, having regard for the effect of changes in output upon costs. The development of these large units is partly due to changes in the technique of production and distribution. Social policy, however, has contributed to this development in a variety of ways. Corporation laws have facilitated the concentration of control of large quantities of the means of production. The patent law, partly directly and partly indirectly, has stimulated and protected concentrations in some industries, although the courts have progressively restricted the rights of patentees. The anti-trust laws have failed to prevent, but have not directly caused increasing concentration of control and the development of price and production policies appropriate to new conditions; they have diverted the adaption into particular channels."

based on the assumption that no one buyer and no one seller will influence the action of the market by his own action alone, the market does not act as it is supposed to act. Means' particular attack is on the lack of price flexibility, and deals with the reaction on the economy of two systems of prices: one, a market system, in which the prices of agricultural products in particular were set before they too became controlled prices, and "administered" prices of the firm that exercises a considerable influence over its price policy. A more complete study than any of the others is that of Walton Hamilton and Associates, Price and Price Policies.[122] This book contains the industry-by-industry study of prices originally made for the Cabinet Committee on Price Policy. This fascinating compilation offers a wealth of detail not elsewhere available on pricing policies on seven different industries. As to conclusions, Hamilton says:

> "The sovereignty of the market is past; political controls are here and we must subdue them to the public interest as best we can."[123]

The important point is not the conclusions reached by any of these studies (it is almost fair to say that each has gone far towards disproving the thesis of its predecessor) but that studies are being made. Perhaps some day we will have enough information on which to decide what kind of a marketing policy we need, and what kind of laws will bring about that policy.

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[122]New York: McGraw-Hill, 1938.

[123]Ibid., 556.

B. The Robinson-Patman Act is evidence of a change from the simple picture of monopoly versus competition.

The principle of the Sherman Act[124] is that if a free market is maintained, no other form of regulation is required--the economy will, by and large, regulate itself. To accomplish this purpose, monopolies were prohibited, restraints of trade declared illegal. The world was divided between the black of monopoly and the white of competition. Monopoly was bad, competition was good. True, some monopolies had already been found to be "natural monopolies" that were to be controlled by public regulation rather than the informal controls furnished by competition. The United States Supreme Court was probably ahead of economic theory when it declared that not all restraints were illegal, but only "unreasonable" restraints.[125] An examination of the records of Congress at the time the Act was passed will show that those who framed the Act never did have the faith in the ability of a one-page statute to prescribe an industrial pattern for an industry. This important Act was discussed less than one day in the Senate and not at all in the House. The discussions that have been referred to in the futile attempt at securing a clear Congressional intent were directed at the Sherman Act, which was never passed.

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[124] 26 Stat. L. 209, U.S. Code, Title 15, C.1, Sects. 1-7.

[125] Standard Oil Co. v U.S., 221 U.S. 1. (1911).

Sherman's bill was replaced by one written by Senator Hoar of Massachusetts, who had little sympathy for any bill stronger than was necessary to dispose of the issue so that the Congress could get to the important work of passing a tariff bill. Senator Hoar had no intention of outlawing monopolies in the economic sense, but used the word in the sense that the law had always used it in the Statute of Monopolies.[126]

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[126]The statement of A.C. Hoffman, Principal Agricultural Economist, Department of Agriculture in Temporary National Economic Commission's Monograph 35, op. cit. p.145.

Large Scale Organization in the Food Industries:

"It is important to note at the outset that the Sherman Act was passed primarily for the protection of the public rather than for the special benefit of the small enterpriser. While the complaints of the latter undoubtedly weighed heavily with the legislators, their main concern was to protect users and consumers of goods and services against exhorbitant profits and undue price enhancement by the monopolist. Certainly this was uppermost in the mind of Senator Sherman, whose objective seems to have been much different from that of some recent legislators whose purpose is only to aid small firms in lines of industry which are admittedly competitive."

If the author of Monograph 35 had consulted Monograph 16 Walton H. Hamilton, Anti-trust in Action, he would have discovered that the only reason the Sherman Act did not embody the special desires of Senators fighting for their respective classes was that each Senator had a special class to argue for, so that the bill was sent to the Judiciary Committee "to deliver the child for nurture to those who had most interest in its death." The conservatives, led by Senator Hoar of Massachusetts had written a law that was "...something at least, for the people back home. And the Congressional campaign was warming up. Besides there were matters of real consequence, such as the McKinley Tariff Act which wanted legislative attention. So, with ohly a single vote of dissent,...on the second of July, 1890, the bill became the law of the land. It is to this day strangely enough called the Sherman Act--for no better reason, according to its author, than that Senator Sherman had nothing whatever to do with it." Idem. p.10.

At the time the Robinson-Patman Act was passed there was much dispute as to whether it was really a part of the anti-trust legislation, and as such aimed at maintenance of competition, or whether it was like the N.R.A. basically an anti-competition creature parading under the something it was not. Was it an Act to maintain competition or to restrain competition? To this question we can say to both sides, "You were right." We can say that the purpose is to promote competition and to restrain competition, for the Act is an expression of the idea that competition itself often needs restraint, for competition, if too intense, may often lead to monopoly. No doubt this statement needs explanation.

The purpose of the original anti-trust legislation[127] was to outlaw monopolies and to prevent competitors from getting together to agree not to compete. The assumption was that if competition were allowed to operate, the rivalry of the competitors was the only safeguard needed by the public. If the seller chose to be unreasonable,the buyers would go to another. If all present members of a trade should become unreasonable, new entrants to the trade would bring the old members to time. As long as competition was preserved, no other method of regulation was

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[127] See Edward S. Mason, "Monopoly in Law and Economics" 47 Yale Law Journal 34, Nov. 1937.

Grether Price Control, op. cit., Chapt. XIV, "Law, Economics, and Trade Regulation."

Miller, Unfair Competition, op. cit., 398,402, and other places.

needed. When competition failed to bring forth the right fruit, it was because competition was being misused; it was *unfair* competition. The anti-trust legislation of the Wilson New Deal attempted to say just what this *unfair* competition consisted of, and to prohibit it through the Clayton and the Fair Trade Commission Acts. The purpose was still to preserve rivals; if there was rivalry between sellers, competition would still do the trick. Therefore it was wrong to injure a rival by unfair methods, because you interfered with his ability to continue as a rival. The emphasis was on the methods used; if fair methods were used, and the successful competitor eliminated competitors without any unfair tactics, no amount of real monopoly power on the part of the successful competitor was to be condemned. Monopoly was in the eyes of the law a standard of evaluation of the methods used to achieve monopoly power, and if no reprehensible methods were used to achieve that power, a combination would not be dissolved just because it was big. Monopoly was a matter of intent, not results.

The Robinson-Patman Act represents a departure from this simple picture. *Where the earlier anti-trust laws looked at the intent of the parties and condemned some acts that probably had no harmful results, because there was an evil intent, the Robinson-Patman Act condemns some acts that have never been considered contrary to good business principles because those acts can lead to bad results from a social view point.* It can fairly be said that the growth of the mass distributors has been almost entirely

free of the practices indulged in by the early trusts. The chains were not violating the business mores of their time when they pressed the manufacturer for a price that threw almost all of the plant's overhead onto the regular independent customers, but the effect of this buying advantage given to the chains was, in the eyes of the Federal Trade Commission, none the less responsible for the growth of the chains and the decline of the chains' competitors. While the methods used by the chains did not fall under the list of prohibited practices, the effect of the chains' practices, according to the Federal Trade Commission, would eventually lead to a monopoly, at least in certain localities and in certain lines. If the A&P could develop from next to nothing to a position where it controlled 10 per cent of the vital food supply of the nation in a short period of years, was it impossible that the A&P could not handle a far greater share in a few years more? The first step, then, was to say that the buying advantages of the chains must be cut to the point where the difference in cost of goods to the big buyer and the little buyer was limited to the differences in the cost of serving the two buyers and not by their differences in bargaining power. The second step, probably not yet used, was to say that if there were too few buyers who could qualify for a quantity discount, the Federal Trade Commission had the right to limit arbitrarily the amount of that quantity discount if a danger of monopoly threatened. This second point is probably more important in its theoretical implications than it is in practice, at least for the moment. There can be no question that it goes far beyond previous ideas of preventing monopoly.

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The Robinson-Patman Act is a somewhat less than frank admission that competition is not always good, and that competition is needful of restraints if monopoly is to be prevented. As in the N.R.A., which was based on the very antithesis of the doctrines of competition, it was necessary to frame the Act in terms of a "good" word, competition. If the chains can compete so effectively that their independent competitors are put out of business, and the big chains can compete so effectively that the smaller chains are put out of business, it is quite possible that the very effectiveness of competition may be the eventual cause of monopoly.

When John Bates Clark[128] wrote his Control of Trusts in 1912, he probably expressed the general view of economists when he said:

> "The statute books of various states bristle with laws...based on a true instinct-antipathy to the monopolistic principle. The other way of attacking the problem...rests on the belief, deep rooted in the minds of the people, that competition is not dead, that the monopolistic powers of the trusts are accidental and not inevitable, that they are built on privileges that can be removed, powers that can be withdrawn and predatory acts that can be forbidden."

The present day economists do not share J. B. Clark's faith in the power of competition to make things right. J.M. Clark, son of J.B. Clark, comes close to a modern definition of

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[128] John Bates Clark and J.M. Clark, Control of Trusts, 1912 quoted in Blaisdell, Federal Trade Commission, New York: Columbia University Press, 1932, p.3.

competition in his new Social Control of Business:[129]

> "But what is competition? It may be defined in general as rivalry for income by the method of giving more than one's rivals give in proportion to what one asks in return or by making the public think so, or by making them at least act as if they thought so to the extent of buying one's goods in preference to those of one's rival. Presumably the successful competitor is giving people what they want, or at least making them think he is giving them what he has made them think they want. And this is a process to which Lincoln's saying about fooling the people is peculiarly pertinent, including the part about fooling some of the people all the time."

J. M. Clark[130] also says that competition is an exception to the general rule that one must not use his property in a way that will injure another. Perhaps we now are ready to limit the ability of one man to injure another through competition, because that is what all so-called "unfair competition" amounts to. As Miller[131] has pointed out:

> "The concepts of fair and unfair competition are not economic, they are regulatory concepts indicating a distinction between what is and what is not countenanced by public policy in the way of competitive practices. The law of unfair competition and the law of fair competition--so far as any such have been developed, are essentially laws applying restraints to competition."

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129 New York: McGraw-Hill, 1939, p.127.

130 J.M. Clark, Social Control of Business, op. cit., p.126.
"Viewed from another angle, competition is an exception to the rule that no one may use his property so as to injure another, for one is allowed to injure his competitors as long as the injuries are merely those incidental to "legitimate" competition."

131 John Perry Miller, Unfair Competition, Cambridge: Harvard University Press, 1941.

It can then, in the light of the discussion above, be truthfully said that those who claimed that the Robinsoh-Patman Act was a restraint on competition are right.

In the sense that the Robinson-Patman Act helps to prevent some competitors from being overcome by competition,thereby lessening competition to the survivors, the Act does promote competition.

C. Back to a "Just Price"?

It is still too early to say whether the present well developed trend towards a non-market determined price is here to stay. We have had periods of price regulation before, and never have been entirely free from some forms of price regulation. Every economic crisis brings a flood of laws that attempt to freeze price, the surface expression of deeper difficulties, and perhaps the present epidemic may leave when the crisis receded. Price fixing was proposed in Massachusetts in 1639 by John Cotton.[132]

> "Price fixing laws of the Revolutionary years may seem to belong to the remote past, but the fact is that for a time during those years prices of nearly every article in general use, as well as the wages of labor, were fixed by most of the state legislatures. This fact is part of our heritage of governmental action, and as such warrants mentioning."[133]

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[132] See N.S.B. Gras, "Historical Background of Modern Price Regulation" in Business and Modern Society, Cambridge: Harvard University Press, Edited by Malcolm McNair and H.T. Lewis, 1938, p.45.

[133] Breck P. McAllister, "Price Control by Law in the United States: A Survey" 4 Law and Contemporary Problems, op. cit. 273, at 275.

It is possible that we may see a reversal of the present trend, but Copeland thinks the business man may as well accustom himself to regulation[134] and Gras recommends a study of the "Just Price" of the Middle Ages, because "we see a comparable system growing up about us."[135]

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[134] Copeland, Administration of the Robinson-Patman Act, 12 Harvard Business Review, op. cit.

[135] N.S.B.Gras, "Modern Price Regulation," op. cit., p.43

ABSTRACT OF THESIS

The Economic Significance of the Robinson-Patman Act

The Robinson-Patman Act, approved by the President on June 19, 1936, has now been on the Statute Books for five years. Seldom has any single law created so voluminous a literature. Trade journals issued special Robinson-Patman issues. Legal and economic discussions were plentiful. The surprising thing is that business men and attornies were unable to answer some of the simplest questions about the application of the Law or the effects of the Law on business problems.

To understand the reasons for this confusion is to make considerable progress towards understanding and evaluating the act itself. When one decides whether the Act is one to promote Competition he has taken at least one step in tracing the irregular pattern of this Law. It is now fairly clear that the Act belongs to the special field of regulating the plane of competition. The Act is limited to defining the type of price discrimination which shall be prohibited to both buyer and seller when the effects of that price discrimination would give an unfair competitive advantage to either the buyer or the seller. It is part of the law regulating market practices.

Discussion of the legal aspects without the marketing aspects of this topic is almost worthless and vice versa. The economic background and political pressure that produced the Act are more

important than the words of the Act itself.

For some years, the so-called "orthodox" or "regular" channels of distribution have met increasingly strong competition from a new rival--the mass distributor. The mass distributor has caused changes far beyond the amount of business he took directly from the old-style channels because of the changes from the former easy-going ways of the independent forced on the little merchant by the chains' rivalry. In an atmosphere where a resort to the law was the order of the day, the small merchant, much more numerous than his mass distributor opponent, followed the procession of manufacturer, farmer, and laborer to the Legislature "hat in hand" and asked for a law to make things right. The Legislature attempted to do this, but the Act coming out of the legislative mill was a product of far more than the single Patman Bill that was intended to crimp the style of the mass distributor by taking away the advantages of buying in quantity. The Bill, as it emerged, incorporated some of the results of years of investigations on the part of the Federal Trade Commission, particularly its investigation of the chain store. Because the Federal Trade Commission had found that chain stores on the whole were desirable institutions it would not subscribe to the theory of the independents who wished to legislate them out of business. The Federal Trade Commission's"Final Report on the Chain Store Investigation" had, however, found a real abuse in certain unfair buying advantages that accrued to the large buyer not because he was more efficient, but because he was a better bargainer.

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The Robinson-Patman Act was made an amendment to the Clayton Act, which, in turn, was an attempt at clarifying the practices prohibited by the Sherman Anti-trust Law. It is written in the language of the Law, not in the language of business. The business man had heard of the Patman Bill written by the counsel of a wholesaler's association--a law that was frankly aimed at crippling by political power a rival who seemed to be winning the economic battle--but it was not the Patman Bill that had been passed by Congress. Action on the part of the Federal Trade Commission to whom the Act was entrusted for enforcement was necessary before a reasonable interpretation was possible.

As case after case came before the Commission a meaning slowly emerged. A definition of the price discrimination against which the Act was now clearly aimed began to take shape. Trial by cost accounting came into its own only to demonstrate that cost accounting was unfitted for the job. A new type of analysis of distribution costs is being developed by the Commission and the business men coming before it. Some manufacturers who feared that they might not be able to justify fairly small savings in cost found that their price structures required not the use of a keen-edged tool but a broad axe to lop off some practices that had "just growed."

Some real pricing evils had developed for which there was neither rhyme nor reason and most of these have now been partially corrected.

The Robinson-Patman Act has not had the effect of being any great stumbling block in the path of the mass distributors because it still allows differences in price where those differences represent savings in the cost of the seller's marketing changes. Because the chains have by no means depended only on the unfair advantages secured by their bargaining efficiency as opposed to their operating efficiency the Act has had no great bearing on the growth of the chains. It may have an adverse effect on the very group of independents it was meant to protect--the groups of independents who banded together for buying purposes under the non-corporate chains. The manufacturer so far seems to be the only clear gainer because the pressure for extra discounts has been partly lightened.

In some countries it is necessary to bargain for each individual article one buys. In America this "higgling" has been largely replaced by a one-price policy. Each customer at one particular store at one particular time will pay the same price. This is not true of non-retail sales. Just as the one-price policy in retailing allows different levels of prices at different stores and in the same store on different days (sales, etc.) so, the adoption of a one-price policy in non-retail selling would also allow for price changes. The non-retail seller has the additional problem of classifying his buyers. The Robinson-Patman Act will probably have a strong tendency towards the establishment of a one-price policy for each individual class of buyers. This tendency has been under way for some years but will, no doubt, be intensified.

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The Robinson-Patman Act represents a departure from previous anti-trust legislation in that it substitutes the effect of certain action as the reason for condemning that action rather than the intent of the actors. As the Sherman Act was interpreted under the rule of reason, mere size or power over an industry was no offense if that size or power had been secured without unfair methods. In the Robinson-Patman Act some methods heretofore considered perfectly legitimate are condemned not because of intent but because the effect was believed to lead to monopoly if that practice were unchecked.

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